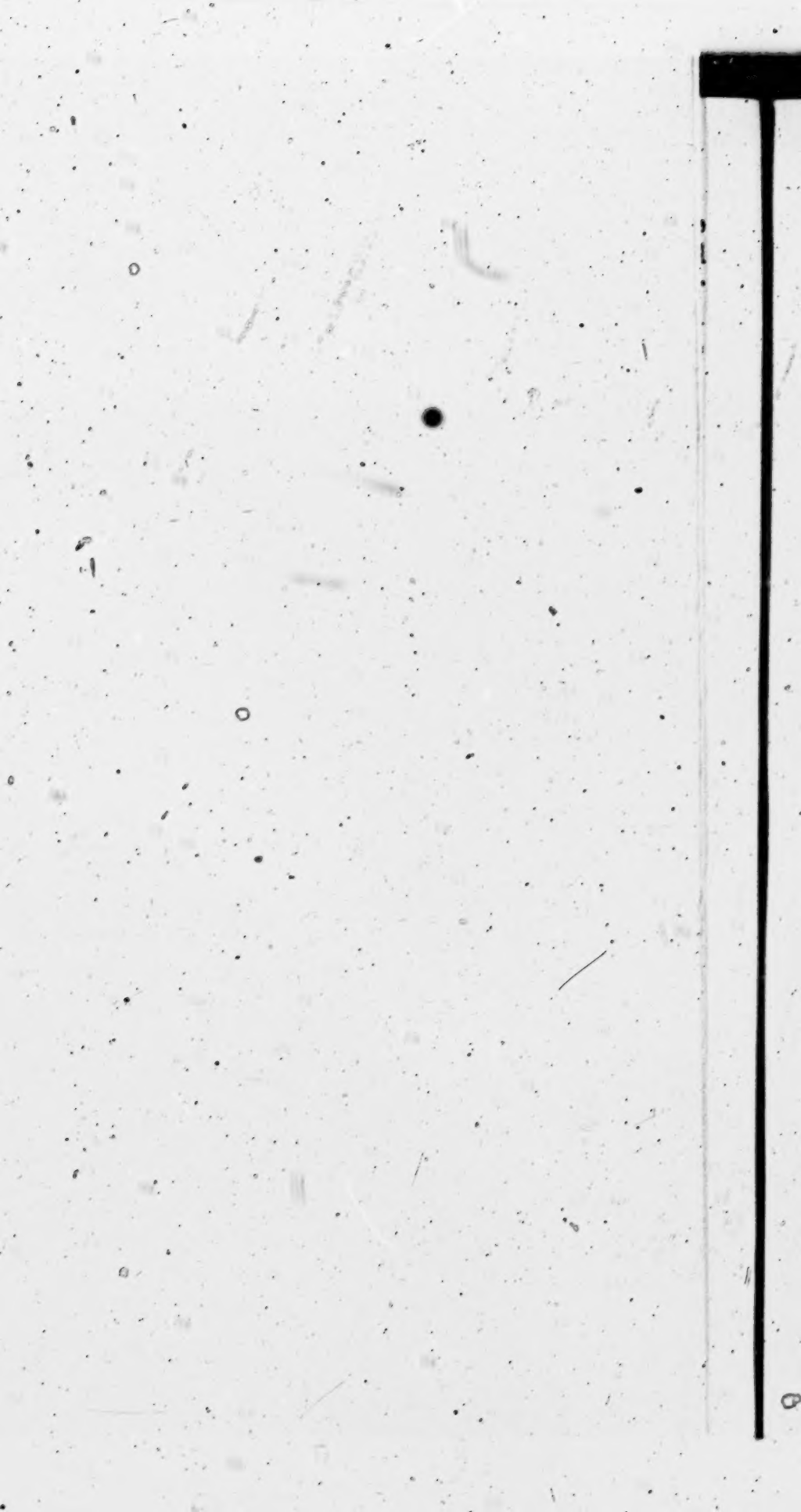

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 40

UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF RAILROAD INTERVENORS.

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
D. ROBERT THOMAS, JR.,
Counsel for Intervenors.

THE ROTHROCK-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

TABLE OF CONTENTS.

Cases Cited.

STATUTES CITED.

AUTHORITIES CITED.

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BRIEF OF RAILROAD INTERVENORS.

OPINIONS BELOW.

The decision of the District Court is unreported. The decision and opinion of the Interstate Commerce Commission is reported in *Cancellation of Livestock Services at Chicago*, 227 I. C. C. 716 (July 11, 1938).

JURISDICTION.

Final decree of the Court below dismissing appellant's bill of complaint was entered on March 9, 1939 (R. 119), and appeal allowed on April 7, 1939. (R. 154) The jurisdiction of this Court has been invoked under Section 210 and Section 238(4) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938. (28 U. S. C. A., Secs. 47a and 345.) Probable jurisdiction was noted by this Court on May 22, 1939.

Statement.

These intervenors are the trunk-line railroads which transport more than eighty-five percent of all the livestock moving to and from the public stockyards of Chicago.[1]

Appellant, Union Stock Yard and Transit Company, was organized in 1865 under a special charter from the State of Illinois, which granted it the power to build, own and operate a railroad and a stockyard and the power of eminent domain. (R. 645-647) Under this authority, the company acquired the necessary real estate for a public stockyard, and approximately 300 miles of railroad tracks consisting of main lines, connecting with trunk lines entering Chicago and switches to adjacent industries. (R. 29) Since 1897, as contemplated and authorized by its charter, the tracks of the Yard Company have at all times been operated under various leases by other carriers. (R. 29) The trunk-line railroads which perform the line-haul service have always moved the livestock with their own power to and from appellant's chutes and chute pens at the public stockyards. Throughout the entire period of its existence, there has been no change of any character in the services performed by the Yard and Transit Company in connection with the transportation of the livestock to and from the yard. The Yard and Transit Company has at all times performed the terminal services necessary to

[1] Atchison, Topeka and Santa Fe Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; H. A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company; and G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

the delivery of the stock consigned to the yards, and to the acceptance and loading of outbound shipments originating at the yard. It has at all times owned and operated the facilities employed in this service. (R. 29) It "not only holds itself out to perform this service at the Union Stock Yards, but demands that the service be performed by none other than itself." (R. 36, 283-285, 341)

While these services are, for convenience, referred to as the loading and unloading services, the services of actually loading and unloading the livestock are only part of a group of services performed by the Yard Company in connection with the transportation of each shipment of livestock to and from the yard. These services, in which there has never been any change, were succinctly described by the Interstate Commerce Commission in an early report from which the following is quoted:

> "The services it renders in connection with shipments of live stock to and from the stockyards are reported to be as follows:
>
> "(a) The service of guaranteeing the railroad companies against loss arising out of the delivery of live stock without the surrendering of the bill of lading.
>
> "(b) The service of guaranteeing freight charges.
>
> "(c) The service of loading and unloading the freight.
>
> "(d) The service of notifying the consignees.
>
> "(e) The service of correctly tabulating the car numbers and contents of the car.
>
> "(f) The service of furnishing the weights to the carriers.
>
> "(g) The service of maintaining records as to dead and crippled animals and of maintaining records showing deliveries to 'billed consignees.'
>
> "(h) The service of furnishing the railroad companies terminal facilities for the receipt and delivery of live stock at Chicago."
>
> *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 213-214 (1919).

The services now being performed by the appellant are the same as those itemized by the Commission. (R. 248, 250, 258-259, 576-599)

One detail of appellant's service should be brought to the particular attention of the Court. The Yard and Transit Company determines at what chutes and pens the livestock shall be loaded and unloaded. By so doing it designates the tracks over which the inbound and outbound cars move to and from the chutes and pens. *To this extent the Yard and Transit Company controls train movements to and from this terminal.*[1]

The public stockyards at Chicago which is owned and operated by appellant is the largest livestock market in the world. Livestock moving to this market by railroad must be taken from the car and placed in the yard by the appellant because the necessary unloading facilities are owned and operated exclusively by it. Through appellant's control of the terminal facilities at the yard, it has a complete monopoly of a service which is an essential part of the rail movement of this great stream of interstate commerce. The District Court made the following finding of

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[1] *Inbound Shipments:* The livestock superintendent of the appellant in charge of the receiving office is advised when a train of livestock arrives at the terminal "and gives information as to which platform train will be unloaded" and "when the train arrives at the platform designated, the crew under the direction of the platform foreman immediately starts to work." (R. 576, 577)

Outbound Shipments: The appellant owns and maintains ten loading platforms at which outbound shipments are loaded. After the appellant has assigned to the trunk-line carrier which is to handle the outbound movement a particular loading platform, the loading foreman of the appellant and a joint agent of the railroads "decide at which chutes the respective cars should be placed for loading and this information is then conveyed to the Road Haul Switching Foreman." (R. 594, 595)

fact which is not contested by appellant: "The court finds that there is no other way of unloading the stock from cars shipped to the Union Stock Yards except through the services furnished by plaintiff." (R. 118)

In *United States* v. *Union Stock Yard and Transit Company*, 226 U. S. 286, decided in 1912, this Court found the appellant Yard and Transit Company to be a common carrier by railroad in respect to the loading and unloading service at this yard, and ordered it to publish and to file with the Interstate Commerce Commission [1] its tariff, stating its charges therefor. Except for a short period, (*Live Stock Loading and Unloading Charges*, 52 I. C. C. 209), the required tariff has been on file ever since.

In 1935, for the purpose of tripling its charges for the terminal service performed by it, without permitting the Commission to pass upon the reasonableness of the increase (R. 311), the Yard and Transit Company filed a supplement to its tariff which contained the notice that no tariffs of the Company would thereafter be filed with the Interstate Commerce Commission.

The Commission suspended the operation of that supplement, and after full hearing, refused to permit the withdrawal of the tariff, holding again, as the Commission and this Court had repeatedly held, that the Yard and Transit Company is a common carrier by railroad subject to the provisions of the Act. (R.28) A petition for rehearing and reconsideration was denied. To comply therewith appellant vacated its cancellation notice as required by the Commission's order, and thereupon refiled it. The Commission again suspended the operation of the notice, and after a second hearing again refused to permit the withdrawal of the tariff. Appellant then brought suit in the

[1] The Interstate Commerce Commission is hereafter generally referred to as the Commission and the Interstate Commerce Act as the Act.

District Court to set aside the Commission's order vacating the cancellation notice. This is an appeal from the unanimous decision of the District Court sustaining the order of the Commission.

THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT.

All parties to the proceeding submitted their respective proposed findings to the court. The court drew its own findings, not adopting any of those submitted by the parties. Thereafter, all of the parties asked the court to amend its findings, but the court made no change whatsoever therein. Appellant refers particularly to the court's finding of fact No. 5, which reads as follows (R. 118):

> "5. Since May, 1922, neither plaintiff nor the Chicago Junction Railway Company has operated any railroad or transported any person or property."

It is clear from other findings of the court, namely, findings of fact Nos. 8, 9, 11 and 12, and the court's conclusions of law, particularly Nos. 2 and 3, that by its finding No. 5 the court means that since May 5, 1923, neither the plaintiff nor the Chicago Junction Railway Company has engaged in the operation of locomotives over railroad tracks. The court's findings of fact Nos. 8, 9, 11 and 12 are as follows (R. 118):

> "8. Plaintiff is and was at the time of the hearing by the Interstate Commerce Commission, and when the Interstate Commerce Commission made its order, a common carrier within the meaning of the Interstate Commerce Act.
>
> "9. The court finds that the services covered by the order of the Commission which are complained of, were interstate transportation services within the meaning of the Interstate Commerce Act."
>
> * * * * * *
>
> "11. The court finds that the unloading of the stock and driving of them to the pens in the Stock Yards constitute interstate transportation services

which are subject to the regulation of the Interstate Commerce Commission.

"12. The court finds that there is no other way of unloading the stock from cars shipped to the Union Stock Yards except through the services furnished by plaintiff."

The court's conclusions of law Nos. 2 and 3 are as follows (R. 119):

"2. The plaintiff is a common carrier and subject to the regulation of the Interstate Commerce Commission.

"3. The plaintiff is engaged in the transportation by railroad of livestock in Interstate Commerce and the services it renders in unloading the livestock from the cars and delivering them to the pens in the Stock Yards are interstate transportation services and subject to the regulation and control of the Interstate Commerce Commission."

SUMMARY OF ARGUMENT.

I.

The loading and unloading of the livestock is a terminal service which is necessary to complete the transportation of this traffic by railroad from and to the public stockyards at Chicago. Appellant alone can perform the service. In the performance of this service appellant is engaged in the "transportation" of livestock "by railroad" as those terms are defined in the Act. It holds itself out to perform this transportation for all alike, for a common charge, and under circumstances which make its business a public calling. It is, therefore, a common carrier engaged in the transportation of livestock by railroad.

Jurisdiction of the Commission over appellant is necessary to carry out the legislative intent and the remedial purposes which Section 15(5), and the statute as a whole, were drawn to effectuate.

II.

In three decisions,[1] the last in 1935, this Court has held appellant to be subject to the Act, and in a fourth decision rendered in 1938[2] the Court held the loading and unloading of livestock at public stockyards to be subject to the jurisdiction of the Commission and not to that of the Secretary of Agriculture.

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[1] *United States* v. *Union Stock Yard and Transit Co.*, 226 U. S. 286 (1912);
Adams v. *Mills*, 286 U. S. 397 (1932);
A. T. & S. F. Ry. Co. v. *United States*, 295 U. S. 193 (1935).

[2] *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470 (1938).

Following the 1912 decision of this Court requiring appellant to file a tariff with the Commission, under Section 6 of the Act, stating its charges for the loading and unloading service, the courts have held many terminal companies, not owning or operating motive power, to be common carriers by railroad.

III.

The Secretary of Agriculture does not have jurisdiction of the loading and unloading services performed by appellant.

Appellant is subject to the jurisdiction of the Commission under the terms of the Interstate Commerce Act, and the Packers and Stockyards Act provides that nothing therein shall affect the jurisdiction of the Commission *over stockyard companies.* The only jurisdiction of the Commission to which this provision could have referred is the jurisdiction of the Commission over stockyards in respect to the loading and unloading service performed by them.

The Commission, over a period of many years, the Secretary by formal decision, and this Court,[1] have all held that the loading and unloading service is subject to the exclusive jurisdiction of the Interstate Commerce Commission and is not subject to the jurisdiction of the Secretary.

Appellant's construction of the statute would involve a dual jurisdiction by the Commission and the Secretary over the terminal service of appellant which would inevitably produce administrative conflict and confusion.

The theory that the Commission could exercise jurisdiction over the service which the shippers are entitled to receive under the Interstate Commerce Act, while the Sec-

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[1] *Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470 (1938).

retary would exercise jurisdiction over the service which the appellant is required to furnish under the Packers and Stockyards Act, is untenable on its face and cannot survive any effort to envisage its practical application.

To remove the delivery service performed by appellant from the jurisdiction of the Commission would leave that service unregulated and so disrupt a complete system of federal regulation at a vital point.

IV.

This Court has specifically held[1] that the status of appellant under the Act is unaffected by any consideration of whether or not it performs this terminal service on livestock as agent of the trunk-line railroads.

V.

The appellant has twice been accorded a full and fair hearing by the Commission.

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[1] *Adams* v. *Mills*, 286 U. S. 397, 415 (1932).

ARGUMENT.

I.

THE APPELLANT IS SUBJECTED TO THE JURISDICTION OF THE COMMISSION BY THE EXPRESS TERMS OF THE INTERSTATE COMMERCE ACT.

The appellant's service of loading and unloading livestock moving to and from the public stockyards at Chicago is an integral part of the complete transportation service. The Interstate Commerce Act denominates the loading and unloading service as railroad transportation. It does so by general terms and definitions in Section 1(3) of the Act, and in specific words in Section 15(5) of the Act.

The terms of the statute and the physical conditions at the yard thus unite to give the appellant a monopoly in the performance of the terminal service which is necessary to complete the transportation of the livestock to and from the Chicago market. The appellant holds itself out to perform this transportation service for all alike, for a common charge, and has done so for 70 years. The single question presented by the appeal, therefore, is whether this essential transportation service is performed by the appellant as a common carrier and subject, as such, to the provisions of the Act, or is performed in a strictly private capacity and, therefore, not subject to the provisions of the Act.

In three cases, this Court has held the appellant to be a common carrier by railroad subject to the regulation of the Interstate Commerce Commission in respect to the loading and unloading services performed by it. Independently of this controlling authority, the plain terms of the Interstate Commerce Act invest the Commission with jurisdiction over the appellant.

A. APPELLANT IS A COMMON CARRIER ENGAGED IN TRANSPORTATION BY RAILROAD UNDER THE TERMS OF SECTION 1 OF THE ACT.

Section 1(1) of the Interstate Commerce Act provides:

> "The provisions of this part shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, * * *." (49 U. S. C. Sec. 1(1).)

Under the express definitions of the Act, the Yard and Transit Company engages in the "transportation" of livestock "by railroad" as a "common carrier for hire."

By the terms of Section 1 (3) "railroad" is defined as follows:

> "The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." (49 U. S. C. Sec. 1 (3).)

The loading and unloading facilities owned and operated by the appellant are "terminals, and terminal facilities" within the meaning of that section, which are both "used" and "necessary in the transportation" of the livestock.

In its report in this case, the Commission states:

> "In *Live Stock Loading and Unloading Charges, supra,* we held respondent to be, in effect, the terminal of the line-haul carriers and that conclusion was upheld by the Supreme Court in *Adams* v. *Mills, supra,* page 409." (R. 40.)

This Court, in *Adams* v. *Mills,* 286 U. S. 397 (1932), referred to in the quotation above, affirmed a decision of

the Commission to the effect that the action of the Yard and Transit Company in making an extra charge against the shippers of 25 cents per car for the loading and unloading services constituted an unlawful practice under the Interstate Commerce Act. The Court said:

> "The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice. The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transportation. That the Yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so." (p. 409.)

Thus it is clear that the Yard and Transit Company operates terminals and terminal facilities which are within the definition of "railroad" under the Act. The same conclusion follows from the fact that the grounds upon which those facilities are located, and which are also owned and operated by the appellant, are "grounds, used or necessary in the transportation or delivery" of the livestock consigned to the Union Stock Yards at Chicago.

In addition to the definition of "railroad," Section 1(3) contains the following definition of "transportation," which expressly includes the services performed by the Yard and Transit Company in connection with its railroad:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." (49 U. S. C. Sec. 1 (3).)

Loading and unloading facilities are included within the statutory term "all instrumentalities and facilities of shipment or carriage" and are therefore defined by the statute as transportation facilities. The Yard and Transit Company performs the services on inbound shipments of unloading the animals into pens for delivery at the stockyards and on outbound shipments of loading the animals from the pens into the cars. By reason of its dominant physical situation the Yard and Transit Company has an absolute monopoly of a service necessary to the completion of the required transportation service at the Chicago public stockyards. As one of its findings of fact, the District Court found that "there is no other way of unloading the stock from cars shipped to the Union Stock Yards except through the services furnished by plaintiff." (R. 118.) The appellant does not contest this fact. Within the express definition of the statute, these are also "services in connection with the receipt, delivery • • • and handling of property transported," and are therefore transportation services.

In the operation of its railroad and the performance by it of the necessary transportation services, the Yard and Transit Company controls the bottleneck through which must pass every head of livestock moving to or from the public market at Chicago by rail. Appellant performs these services as a public utility. It holds itself out to the public to provide the terminal facilities and the loading and unloading services on all shipments consigned to those yards for a common charge, and therefore, engages in the transportation of property by railroad as a common carrier for hire and not in a private capacity. Under these circumstances, appellant falls directly within the terms of the statutory definition of common carrier, which is as follows:

"The term 'common carrier' as used in this part

shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire." (49 U. S. C. Sec. 1 (3).)

In respect to the appellant's status as a common carrier engaged in the transportation of property by railroad, the Commission made the following findings of fact:

"These services consisted and consist today of the unloading of livestock from railroad cars into unloading pens located on respondent's property and of the loading of livestock from loading pens into railroad cars. Such services have always been performed by respondent's employees, and under respondent's rules the services cannot be performed by persons who are not employed by respondent. The livestock is now, and, except for a period early in respondent's history, always has been, hauled by the trunk lines to the platforms where respondent furnishes the services and facilities to complete the transportation." (R. 34.)

* * * * *

"The unloading and loading of livestock at respondent's yards and the furnishing of the facilities is an inseparable part of the interstate railroad transportation. Respondent not only holds itself out to perform this service at the Union Stock Yards, but demands that the service be performed by none other than itself. Through custom and usage respondent's yards have become for all practical purposes the sole terminal in Chicago for the receipt of the major portion of livestock reaching that point by rail, and respondent by reason of its practices has held itself out as ready to perform part of the interstate transportation necessary to effect delivery Having attained this status, and thereby having rendered impracticable the construction and maintenance of separate livestock terminals by the individual railroads reaching Chicago, it cannot now escape the obligations imposed by law merely because it has leased the performance of some of its common-carrier functions to another corporation." (R. 36.)

* * * * * *

"In the contemplation of its charter it is still engaged in the 'public callings' of operating public stockyards and a railroad as an adjunct thereto. In *Live Stock Loading and Unloading Charges, supra*, we held respondent to be, in effect, the terminal of the line-haul carriers and that conclusion was upheld by the Supreme Court in *Adams* v. *Mills, supra*, page 409. Respondent not only holds itself out to perform the 'transportation' in question, constantly acting in that capacity, but insists upon doing so." (R. 40.)

"Under the conditions existing at Chicago, respondent's yards are substantially the sole terminal in Chicago for the receipt of livestock and, as to the unloading of shipments destined to the yards, the railroads have to employ respondent to perform the service. Consequently the freedom of bargaining commonly entering into the creation of the usual relationship of principal and agent is not possible. Respondent is agent of the line-haul carriers' precisely as is a switching carrier completing delivery for a line-haul carrier because it, too, is a common carrier whose charges are subject to regulation.

"We are of opinion and find that respondent in the performance of these unloading and loading services is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with us covering its charges for unloading and loading livestock at its public stockyards in Chicago." (R. 42.)

On these facts the Commission rightly held that plaintiff performs these transportation services as a common carrier and not in a private capacity.

B. THE RELEASE OF APPELLANT FROM THE JURISDICTION OF THE COMMISSION WOULD DEFEAT THE REMEDIAL PURPOSE OF SECTION 15 (5) OF THE ACT.

It is not necessary here to rely solely upon the comprehensive character of Section 1 in order to show the Congressional intent to vest the Commission with the power to regulate appellant's transportation activities. A

specific section of the Act, Section 15(5), was enacted in 1920 at the insistence of the very shippers who would now be injured if appellant should succeed in its purpose to free itself from the jurisdiction of the Commission in order to accomplish a large increase in its loading and unloading charges. (R. 311.) That section reads as follows:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefore to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards." (49 U. S. C. Sec. 15(5).)

The history of the enactment of that section shows that its purpose was to vest the Commission with power to regulate the appellant's services of loading and unloading and its charges therefor. These facts were correctly stated by the Commission in its report in this case, as follows:

> "*The enactment of this paragraph* [Sec. 15(5)] *resulted from respondent's action in 1917* in increasing its unloading charge and the refusal of the line-haul carriers to absorb the increase, with the result that the additional charges imposed by respondent were collected from the consignees. The practices of carriers and stockyards of adding terminal charges to the scheduled railroad rates had been bitterly

complained of by livestock shippers, and prior to the enactment of the above paragraph Congress was fully informed of the status of public stockyards and the services which they performed. Senator Cummins, Chairman of the Interstate Commerce Committee, stated that the purpose of the amendment was to require that the series of services rendered in connection with the transportation be performed for a single scheduled rate, and when the conference report on the bill in its final form was made, the House managers stated that the purpose of the amendment was to provide that the through rates on livestock should include unloading and other incidental charges. *The legislative history of the paragraph indicates clearly the single purpose to give the Commission authority over services rendered and facilities used in the delivery of livestock at public stockyards.*" (R. 37; italics ours.)

"Since respondent performs the service as common carriage, there is no reason, from a legal standpoint, why, as so performed, Congress' declaration that it is part of the railroad transportation should not still be given effect. There is a great deal of reason for so doing from the standpoint of giving full effect to the remedial purpose of section 15(5)" (R. 38).

As the Commission has found, it was solely the action of this appellant which caused the enactment of Section 15(5). In every substantial respect its course of action now is the same course of action which produced that legislation. Then, as now, it was seeking to escape from the regulation of the Commission in order to increase its charges. Appellant filed a tariff with the Commission in 1917 stating its proposed increased charges, but the various national associations of livestock shippers opposed the increase and the operation of the tariff was suspended. *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209 (1919). Pending the decision on the proposed increase, appellant filed a tariff effective September 7, 1917, cancelling its tariffs with the Commission, just as it has

done in this case. Although it had been held by this Court in 1912 to be a common carrier subject to the Act, appellant contended, as it does again here, that its status had been altered by changes in the lease of certain facilities, which, however, like the 1922 lease here relied upon, did not include the loading and unloading facilities. The shippers protested the withdrawal of the appellant's tariff just as they do here, and the Commission suspended its operation. The cancellation notice became effective, nevertheless, because the Commission's power to suspend that action was and is limited by the Act, Section 15(7), and the necessary hearings could not be completed within the prescribed period. Having succeeded in this manner in withdrawing its tariffs from the Commission, the appellant, then as now having a monopoly of the terminal services and possession of the livestock, simply collected the increased charges from the shippers. The Commission's decision on further hearing again held appellant to be a common carrier, and required it to pay reparations to the shippers in the amount of the increased charges so collected by appellant without the sanction of the Commission. This decision was not rendered until July 15, 1920. *Live Stock Loading and Unloading Charges*, 58 I. C. C. 164. The award of reparations[1] against the Yard and Transit Company was later sustained by this Court on the ground that the collection by that company of the increased charge against the shippers constituted an unreasonable practice under the provisions of the Interstate Commerce Act. *Adams* v. *Mills*, 286 U. S. 397 (1932). Appellant paid the award.

But in the meantime, prior to the Commission's decision, and long before the matter in dispute was authoritatively put to rest by this Court in *Adams* v. *Mills*, *supra*, the appellant had forced the livestock shippers to pay increased charges not on file with the Commission, and was firmly

[1] Section 16 of the Act authorizes awards of reparation against common carriers only.

maintaining, just as it is here, that it was no longer subject to the Interstate Commerce Act. Faced with this situation, early in the year 1920, the various national associations of livestock shippers, while pursuing their remedies before the Commission, urged the enactment of Section 15(5) with a purpose to establish beyond possible controversy the jurisdiction of the Commission over the whole subject of loading and unloading at public stockyards and the charges therefor. Senator Cummins, co-author of the bill and Chairman of the Committee which reported it, stated, in part, as follows:

> "Mr. President, this proposed amendment has been brought to my attention by the American National Live Stock Association, of which Judge Cowan, of Fort Worth, is the general counsel.
>
> • • • • •
>
> "I am entirely in sympathy with the purpose of these shippers and want to bring the whole subject within the jurisdiction o the Interstate Commerce Commission • • •." (Cong. Rec. Vol. 59, p. 674.)

The purpose of Section 15(5) to place the whole subject of the loading and unloading services and charges under the regulation of the Commission for the protection of the shipper against the very action which appellant seeks here to repeat, is thus established by the history of that legislation.

This Court itself has recognized the direct relationship between the enactment of paragraph (5) of Section 15 and the controversy between the appellant and the shippers, culminating in the decision in *Adams* v. *Mills, supra.* It has recognized that that section of the Interstate Commerce Act and the provisions of the Packers and Stockyards Act, enacted a year later, must be read in the light of that controversy. In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193 (1935), the Court said:

> "Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the

controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock received. The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. * * * Section 406 provides that the Act shall not affect the jurisdiction of the Commission or confer upon the Secretary concurrent jurisdiction over any matter within the jurisdiction of the Commission." (pp. 199-200.)

Appellant asserts again and again in its brief (pp. 9, 39) that the shippers do not pay the appellant's charges. But the shippers know that they do. Their conviction of that fact is attested by the presence before the Commission in this proceeding of every large livestock association in the West, vigorously opposing appellant's effort to free its charges of regulation by the Commission. (R. 571.) With like disregard of the realities appellant argues that in causing the enactment of Section 15(5) the shippers intended that the loading and unloading services and charges should be unregulated. (Appellant's Brief, p. 63.) The shippers were engaged in a bitter fight against the collection of the increased and unauthorized charge by the appellant and the contention of that company that it was no longer subject to regulation. This provision of the law had its origin in the insistence of the shippers that appellant must be subject to regulation by the Commission. The shippers understand perfectly that the loading and unloading services must be compensated for out of the line-haul rate which they pay, and that increases in the charges for these services must eventually be reflected in a higher line-haul rate. It is solely for that reason that the shippers secured the enactment of Section 15(5) and have been active in this proceeding with a purpose to prevent the nullification of that legislation.

C. TO HOLD THE APPELLANT NOT SUBJECT TO THE ACT WOULD DEFEAT THE INTENT OF THE STATUTE TO PROVIDE MEANS TO COMPEL THE PERFORMANCE OF A VITAL TRANSPORTATION SERVICE WHICH IS AND CAN BE SUPPLIED ONLY BY THE APPELLANT.

In the interpretation and application of the Interstate Commerce Act, the courts have constantly kept before them its intent, and to the full extent possible under the terms of the statute, have been at pains to give effect to that intent. Here, likewise, in interpreting the Act to determine its application to the plaintiff, the Court should have before it facts which show that the release of the appellant from the jurisdiction of the Commission would defeat the legislative intent and the remedial purposes which the statute was drawn to effectuate.

In interpreting the intent of Congress which underlies Sections 1 and 15(5) of the Act, it must be borne in mind that when these provisions of the law were enacted the Packers and Stockyards Act was not in existence. If the appellant was not made subject to the Interstate Commerce Act in respect to its loading and unloading services, it must be found that Congress intended at that time that those services and the charges therefor should be unregulated.

In view of the fact that the appellant is, within the statutory definitions of the Act, engaged in the "transportation" of livestock by "railroad" "as a common carrier for hire" it would require strong proof to make a showing that in enacting the general terms of Section 1 and the specific terms of Section 15(5), Congress intended to withhold from the Commission jurisdiction over the appellant's transportation services and charges. No such showing can be made. On the contrary, an examination of other portions of the Act itself shows that regulation of the appellant by the Commission is necessary to effectuate the purposes of the Act.

Two of the fundamental purposes of the Act are given expression in its first section. The first, always a primary step in the process of regulation, is that means shall exist under the Act to compel the performance of the necessary public service (Sec. 1(4)); the second is to provide that the charge for the service shall be reasonable.

In its first section, the Act provides:

> "It shall be the duty of every common carrier, subject to this part, engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor • • •". (49 U. S. C. Sec. 1(4).)

We ask the Court to consider whether the legislative intent which underlies this provision would be effectuated or defeated by holding appellant not subject to this requirement.

The loading and unloading service performed by appellant is a vital terminal service which is an indispensable part of the transportation of livestock to and from the public stockyards at Chicago. The public stockyards at Chicago, which is located upon the premises of the appellant, is the largest livestock market in the world. Since 1880, the receipts at this market have ranged between eight and eighteen million head per annum, and the annual movement by rail from 100,000 to 300,000 cars. (R. 733-735.) The shippers of livestock have the right under the Interstate Commerce Act to consign their livestock to that market, and the trunk-line railroads have no choice but to carry it there. But the trunk-line railroads which transport the livestock to and from the yards are themselves powerless to complete the transportation by making the delivery required by Sections 1(3) and 15(5). The extensive facilities used in and necessary to the delivery and receipt of the great stream of commerce moving to and from the Chicago market are owned by the appellant. Ap-

pellant insists upon operating these facilities itself. It will not permit the trunk-line railroads to enter upon its premises for the purpose of accomplishing the delivery or receipt of the stock. (R. 36, 283-285.)

The dominant physical position of the Yard and Transit Company gives it a monopoly in the handling of this traffic so complete that no livestock can be transported to or from the public stockyards at Chicago without paying toll to the appellant. Congress did not intend to leave performance of this vital transportation to the choice of those who own and operate the instrumentalities necessary to its performance. It cannot be doubted that when Congress declared, both in general terms (Sec. 1(3)), and in specific terms (Sec. 15(5)) that transportation wholly by railroad shall include delivery to the livestock at public stockyards, it intended to give the Commission power to compel the performance of the service necessary to complete the transportation of the livestock.

The trunk lines can neither perform the required delivery services themselves, nor can they compel the Yard and Transit Company to perform those services. The jurisdiction and control of the trunk-line carriers, to which counsel for appellant would limit the Commission does not, therefore, give jurisdiction and control of the delivery service which must be performed by the appellant. Unless there is direct jurisdiction of appellant under the Act, appellant has an absolute veto power over the great movement of livestock to and from the public stockyards at Chicago. To leave the performance of this vital delivery service to the choice of the appellant by relieving it from the jurisdiction of the Commission would defeat the clear intent of Congress, Section 1(4), that power shall exist under the Act to compel the performance of necessary railroad transportation upon request therefor.

D. TO RELEASE APPELLANT FROM THE JURISDICTION OF THE COMMISSION WOULD DEFEAT THE INTENT OF CONGRESS TO SUBJECT THE CHARGES FOR RAILROAD TRANSPORTATION TO THE CONTROL OF THE COMMISSION.

The second of the fundamental purposes of the Act which have expression in its first section is found in the following declaration:

> "All charges made for any service * * * rendered in the transportation of passengers or property * * * as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof is prohibited and declared to be unlawful." (Sec. 1 (5).)

We ask the Court to consider here whether the intent of the Congress which underlies that provision of the Act would be effectuated or defeated by the removal of the appellant and the control of its charges, from the jurisdiction of the Commission. In its report in this proceeding, the Commission states:

> "The fact that the railroads must proffer the (delivery) service as part of their interstate railroad transportation, absorbing any charge exacted therefor, is inescapable. If respondent doubles its present charge of $1.25 it must still be absorbed. Either the railroads must bear the increase or pass it on to the shippers in an increased through rate." (R. 38.)

In discussing the effect of a doubling of appellant's charge for the delivery service performed by it, the Commission was not indulging in idle speculation. In recent years, appellant, proceeding under the processes of the Act as a common carrier, has secured large increases in its charge for the delivery services performed by it. The result, as the Commission states herein, is that appellant's present tariff charge for this unloading service is five times the charge imposed for the same service approximately twenty years ago. (R. 40, 41, 342; see also

Livestock to or From Union Stock Yards, Chicago, 222 I. C. C. 765 (1937).)[1]

Despite these drastic increases, the Vice President and General Manager of the Yard and Transit Company testified under questioning by the Commission's Examiner that the real purpose of the appellant behind its effort to escape the jurisdiction of the Commission is now to establish a charge more than three times the present basis which it secured by filing its tariffs as a common carrier under the Act. We quote from the record as follows:

> "Exam. Carter: *Has it been the purpose of the Stock Yards Company since sometime prior to the date on which it filed these tariffs in Docket 4109 to increase its charges for this particular service $3 per car? Has not that been the purpose, or one of the purposes at least* of the Stock Yards Company in the various matters that it has undertaken to accomplish, that is, by the contracts, and by joint arrangements with the Stock Yards Company, and by filing the tariff with the Secretary of Agriculture and by *the withdrawal of the tariffs from the files of the Commission?*
>
> "Witness Henkle: I think that is a correct interpretation of our endeavor." (R. 311).

This witness then testified further as follows:

> "Exam. Carter: Did you ever give consideration, Mr. Henkle to attempting to justify an increase in the charge, of $3 per car, before the Commission?
>
> "Witness Henkle: No, sir, not before the Commission.
>
> "Exam. Carter: I know you never attempted to

[1]In the case cited which was pending before the Commission contemporaneously with the instant proceeding, the action taken by appellant was based upon its status as a common carrier subject to the Act. *We respectfully commend the Commission's report therein to the particular attention of the court.* It emphasizes the fact established by this record, that appellant is interested in the question here before the court, only because of its bearing upon appellant's effort to make an increase in its charges which it is unwilling to submit to the Commission.

justify it before the Commission, but I mean, have you given consideration to making an effort to justify an increase of $3 before the Commission? In other words, in the previous proceeding when you wanted to increase the charge from 50 cents to 75 cents and from 75 cents to $1.25 and so forth, you brought proceedings before the Commission to accomplish that, did you not?

"Witness Henkle: Yes, sir.

"Exam. Carter: And that went along for a number of years, did it not?

"Witness Henkle: Yes, sir.

"Exam. Carter: Now, this may not be relevant either to the issues, but why is it you did not continue with that procedure?

"Witness Henkle: Well, the various plans that we have undertaken and developed in connection with getting increased rates have been the subject of discision with our attorneys and they have been the ones that have finally decided in which direction we should endeavor to secure increased revenue." (R. 311, 312.)

The increases which it has made in recent years have been so great that appellant has not deemed it expedient to go again before the Commission as it has so frequently in the past, and seek to justify a further increase in its charge. Rather, it has tried to employ a number of "devices" (the word used by the Commission) which were designed to enable it further to increase its charge without submitting the reasonableness of the higher charge to the Commission. In the decision referred to above, rendered by the Commission during the progress of this proceeding (in which the appellant was seeking through another device to triple its rates without permitting the Commission to pass upon the reasonableness of the higher charge) the Commission said:

"We have referred to the unusual methods selected by the yards company since 1934 to increase the compensation it receives from the trunk lines for the performance of the loading and unloading services, and

> we have called attention to the fact that *the objective of the yards company in the selection of these methods is to be relieved from any supervision of the charges it seeks to exact from the trunk lines.* • • •" (*Livestock to or From Union Stock Yards, Chicago*, 222 I. C. C. 765, 773 (1937).)

Appellant's present per-car charges for the loading and unloading charges are approximately five times those in effect only 20 years ago and it now seeks to defeat the jurisdiction of the Commission so that relieved of regulation it may immediately triple the present charges. After discussing the other "devices" employed by appellant to increase its charges, the Commission referred to the position of appellant in the instant proceedings as follows:

> "The next step taken by the yards company *to increase its charges* for loading and unloading livestock *was an attempt to eliminate itself from any regulation by us.* This attempt assumed the form of a supplement to its existing tariff on file with us in which it was stated that the yards company would not file tariffs with us." *Livestock to or From Union Stock Yards, Chicago*, 222 I. C. C. 765, 769 (1937).

The utility before the Court is seeking to escape regulation in order to effect increases in its charges which it knows it cannot justify under regulation. Section 1 of the Act provides that "all charges for the transportation of property shall be just and reasonable." The power and duty "to determine and prescribe what will be the just and reasonable • • • charge" is committed to the Commission by Section 15 (1) of the Act. It is clear that the intent underlying these provisions of the Act would be frustrated by the release of appellant from the jurisdiction of the Commission.

E. CONGRESS HAS APPROVED THE CONSTRUCTION WHICH THIS COURT PUT UPON THE ACT IN HOLDING APPELLANT TO BE SUBJECT THERETO.

The appellant has cited certain legislative history in attempting to avoid the express provisions of Section 1(3) of the Interstate Commerce Act defining the appellant's loading and unloading facilities as a "railroad" and its services as "transportation" services. (Appellant's Brief, pp. 51-59.) To do so, it has gone back to the enactment of certain amendments to the Act in 1906, making extensive quotations from the Commission's Annual Reports preceding those amendments and from the Congressional Reports. These quotations, however, deal only with the furnishing of refrigeration and cars to the railroads under private contracts which the railroads are free to make or not, as they please. The trunk-line carriers have no such freedom of choice with respect to the facilities and services furnished by the Yard and Transit Company. They are compelled to transport livestock for delivery at the public stockyards, yet the stockyard companies have an absolute monopoly over the completion of the required transportation services.

Appellant does not deny that by the very words of Section 1(3), the terminal facilities owned and operated by the appellant constitute a railroad and that its services in connection with those facilities constitute transportation by railroad. Six years after the enactment of the Hepburn amendment, which appellant now seeks to construe as not applying to stockyards companies, the Supreme Court held that the comprehensive provisions of Section 1(3) as amended in 1906 did apply to the Yard and Transit Company and it quoted those provisions as authority for its holding that the Yard and Transit Company was a common carrier engaged in transportation and subject as

such to the jurisdiction of the Interstate Commerce Commission. *United States* v. *Union Stock Yard and Transit Company*, 226 U. S. 286, 303-304 (1912). Thus, appellant's attempted restriction of the meaning of those provisions has long ago been rejected by this Court itself.

Furthermore, after the Yard and Transit Company had been held by both this Court and the Commission to be a common carrier subject to the Act, the definition of "common carrier" was not restricted but was expanded in 1920 to include the provision that "the term 'common carrier' as used in this part shall include * * * all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire." Section 1(3). As the appellant has stated, where an act has been judicially construed and is subsequently amended without changing the terms construed, it should be presumed that Congress approved of the previous construction. (See Appellant's Brief, pp. 57-58.) That principle applies with full force to this case, since the definitions of "railroad", of "transportation" and of "common carrier", which previously had been held to apply to appellant, were not restricted in their application by the comprehensive amendments of the Transportation Act, 1920. In fact, as has been noted, the definition of common carrier was expanded, and by the addition of Section 15(5) the services of loading and unloading at public stockyards were expressly included within transportation in order to deal explicitly with the Yard and Transit Company's insistence at that time that it was no longer subject to the jurisdiction of the Commission. Later, by the incorporation of Section 406 in the Packers and Stockyards Act[1]

[1] "Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission." (7 U. S. C. Sec. 226.)

Congress took pains to preserve the Commission's jurisdiction over the loading and unloading service. (See pp. 52, 53, this brief.)

II.

THE STATUS OF APPELLANT AS A COMMON CARRIER BY RAILROAD SUBJECT TO THE INTERSTATE COMMERCE ACT IS ESTABLISHED BY THE DECISIONS OF THIS COURT.

The following decisions of this Court establish the status of appellant as a common carrier by railroad, subject as such to the Interstate Commerce Act:

United States v. *Union Stock Yard and Transit Co.*, 226 U. S. 286 (1912);

Adams v. *Mills*, 286 U. S. 397 (1932);

A. T. & S. F. Ry. Co. v. *United States*, 295 U. S. 193 (1935);

Denver Union Stock Yard Co. v. *United States*, 304 U. S. 470 (1938).

A. THE STATUS OF THE APPELLANT IS ESTABLISHED BY THE 1912 DECISION OF THIS COURT IN UNITED STATES v. UNION STOCK YARD AND TRANSIT CO.

The first of these cases, *United States* v. *Union Stock Yard and Transit Co., supra,* was brought by the United States at the request of the Commission. The prayer of the complaint was that an injunction issue restraining the Union Stock Yard and Transit Company and the Chicago Junction Company and each of them from further engaging in interstate commerce until the former had filed its tariff stating its charges for the loading and unloading service performed by it, and the latter had filed its tariff stating its charges for the switching services performed by it. The Court held each of these companies to be a common carrier by railroad and required each to file its tariffs

under Section 6 and to file its reports in conformity with Section 20 of the Act. The appellant was required to file the tariff which it now seeks to withdraw.

For more than forty years, a period beginning long prior to the decision of the Court, the appellant has not operated any locomotives or cars. (R. 29.) Throughout that period the tracks owned by it which serve the Yard have been leased to other carriers. From a time prior to 1912 and up until 1922 the tracks were leased to the Chicago Junction Company; since 1922 they have been leased to a subsidiary of the New York Central Company. Appellant's annual income from the operation of those tracks is now somewhat greater than that received from the Junction Company in the years preceding the decision of the Supreme Court in 1912. (R. 31, 32.) The Junction and the appellant were in 1912 and are now owned by the same holding company. (R. 32.)

In the 1912 case, the Court was called upon to determine the status under the Act of both the Junction Company and the Yard and Transit Company. For this reason there is discussion in the opinion of the activities of each company and of their corporate history and relationship. Pointing to this discussion it is argued that appellant was held subject to the Act, not because of its own operations, but only in a sort of vicarious capacity, and solely because the Junction was found to have that status. The Junction having subleased the appellant's tracks to the New York Central in 1922, it is argued, in reliance upon this theory, that the Yard and Transit Company ceased to be a common carrier in that year. This view is in conflict with the Court's decree. The specific service which appellant was required to cover by tariff publication, pursuant to Section 6 of the Act, was not a service performed or participated in by the Junction; it was the service of loading and unloading performed by the appellant alone.

For forty years that has been the only service performed by the appellant in connection with the movement of livestock to and from the Yard, and it is a service which has not been affected in the slightest degree by the 1922 lease or any of the previous leases upon which appellant has relied from time to time to relieve itself of its status under the Act. None of these leases have covered any facilities used by appellant in the loading and unloading services.

From the very beginning of the operations of this Yard, the trunk lines, through the exercise of running rights over the tracks of the Yard and Transit Company, have handled the livestock to the unloading chutes with their own power. Neither the Junction[1] nor the appellant has ever participated in the handling of the stock until it has been placed at the unloading platforms and then it is the appellant which has always taken control of the stock and performed the unloading service. This was the fact for many years prior to 1912 and it is the fact today. There has never been any change in the handling accorded the livestock by appellant. The services performed by it today are admittedly exactly the same services which in 1912 this Court required it to cover by tariff publication pursuant to Section 6 of the Act.

In thus requiring the loading and unloading service of appellant to be covered by tariff this Court necessarily held that service standing alone, in and of itself, to be a common carrier service. If, as argued, the Court ordered appellant to publish its charges for the loading and unloading service not because of the character of that service itself but solely because the Junction was found to be a common carrier, it might well be asked why the Court did not also require the appellant to file with the Commission its charges for the many stockyards services performed by

[1]Except for a special service on horses and mules. (R. 338.)

it. The Court did not do so because only common carrier services are required to be covered by tariff publication under Section 6 of the Act. It follows that the decision of the Court definitely established the status of appellant's loading and unloading service to be a common carrier service. In this connection we direct attention to the following statement in appellant's brief (p. 52):

> "Had it been the intent of the Act to make such agent a common carrier, the Congress seemingly would have required such charges to be filed by the agent performing the service and not by the railroad company, *since by Sec. 6 it is the carrier furnishing the service to the shipper which must file the charges assessed against him.*" (Italics added.)

We agree with the view expressed by the words italicized. It follows that when this Court in its 1912 decision required appellant to file its loading and unloading charges under Section 6 of the Act, appellant was thus found to be "the carrier furnishing the service to the shipper." There has been no change of any character in the circumstances under which appellant furnishes this service to the shippers.

The appellant did not intend that the 1922 lease should affect its status as a common carrier by railroad and its conduct in the years following the making of the lease shows that it did not believe the lease had had that effect. At the time the 1922 lease came before the Commission in the *Chicago Junction* case (71 I. C. C. 631 (1922)), appellant's tariff covering the loading and unloading services had been on file for ten years. The tracks proposed to be leased in that proceeding did not include the facilities employed in the loading and unloading of the livestock which this Court required appellant to cover by tariff publication in 1912. The report of the Commission approving the lease on certain conditions shows that it was not suggested by the appellant, a party to

the proceeding, or by anyone else, that the proposed lease had any relation to the common carrier status of the Yard Company in the performance of the loading and unloading service.

From the time in 1911 when the Commission requested the Attorney General to bring suit to compel the Yard and Transit Company to file its tariff, the formal decisions of the Commission show its constant belief that the public interest required the regulation of appellant under the Interstate Commerce Act. If the Yard and Transit Company had expected to free itself from that regulation by inducing the Commission to find the 1922 lease to be in the public interest, the concealment of that design would have been a fraud upon the Commission. There is ample evidence, however, that appellant had no such purpose, or indeed had any thought that the proposed change in the lease of its tracks, already under lease for twenty-five years, would affect its status under the Act. Within a few months after the execution of the lease and twice thereafter, the appellant took advantage of its common carrier status and the processes of the Inte state Commerce Act thus available to it, to seek an increase in its charge for the delivery service which it performed. (R. 41.) Not until ten years later when appellant felt that it had advanced its charges to the full extent possible under public regulation did it contend that the 1922 lease had relieved it of its obligations as a common carrier. The precise contention again made here was then urged before this Court in the so-called *"Hygrade case"*[1] (*infra*, pp. 40-43) and was rejected by this Court.

This is convincing evidence that when appellant made and secured approval of the 1922 lease it did not believe that the lease affected its railroad status. The report of the Com-

[1] *A. T. & S. F. Ry. Co. v. United States*, 295 U. S. 193 (1935).

mission herein directs attention to the fact that in this very lease which appellant relies upon to divest itself of the status of a common carrier by railroad, it stipulates, for a consideration, that in its capacity as a railroad it has the power of eminent domain and covenants that it will perpetuate its charter powers, *as a railroad*, and preserve its right of eminent domain, and that at any time it may be called upon by its lessee to do so, it will exercise its power of eminent domain to condemn any additional lands required by its lessee in the operation of the leased lines. (Article V, R. 667.)

In an effort to explain away the basic inconsistency of contending that under this lease its status as a railroad is both preserved and destroyed, appellant declares that various agencies which are not railroads have the power of eminent domain. That is true, but the power of the appellant to take lands by eminent domain for railroad purposes was not granted to it as a Cemetery Association or as a Drainage District, or in any other capacity save "as a railroad," and that power which it has so carefully preserved and which it covenants to use upon request of its lessee is now held by it as a railroad corporation.

Appellant seeks to distinguish the 1912 decision on the following grounds:

> "The conjunction in ownership, operation and service between the appellant and an operating railroad company, upon which the decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, rested, no longer exists." (Appellant's brief, p. 70)

As far as the "operation and service" of the appellant is concerned, it is the same now as it was in 1912. Then as now it completed the transportation by unloading the shipments which were drawn to its docks by motive power of the trunk-line carriers. Its activities were and are a

vital and integral part of the transportation. The 1912 decision cannot be thus distinguished.

Nor can it be distinguished on the ground that there has been a separation of ownership, even if the change made in the lease in 1922 be taken to be a change of "ownership," as appellant assumes. This Court has squarely held that the decision in *United States* v. *Union Stock Yard and Transit Company* was based upon the fact that the appellant's facilities were "used as an integral part of each railroad line," and not based upon any common ownership with another company. In *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296 (1919), the Court said:

> "The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, *even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in United States* v. *Union Stock Yard Co.*, 226 U. S. 286, and the wharfage facilities in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498. They are clearly unlike private plant facilities. Compare *Tap Line Cases*, 234 U. S. 1, 25. The services rendered by the Terminal are public in their nature; and of a kind ordinarily performed by a common carrier. (pp. 304-305.) (italics ours)
>
> • • • • • •
>
> "As the Terminal receives both from railroad companies and from shippers also less-than-carload freight, it doubtless performs the loading and unloading, as is done at other railroad stations; and for freight delivered at Brooklyn takes appropriate receipts. In no respect, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations. True, the service is performed by the Terminal under contracts with the railroad companies as agent for them and not on its own account. But a common carrier does not cease

to be such merely because the services which it renders to the public are performed as agent for another." (pp. 306-307.)[1]

None of the three points of distinction alleged by appellant to have been created by the 1922 lease—a change in "ownership, operation and service"—is valid to distinguish the 1912 decision, which, we submit, controls this case.

B. THE STATUS OF APPELLANT AS A COMMON CARRIER, SUBJECT TO THE ACT, HAS BEEN REAFFIRMED BY THE COMMISSION AND THIS COURT IN MANY DECISIONS SINCE IT WAS SO ESTABLISHED IN UNITED STATES v. UNION STOCK YARD AND TRANSIT COMPANY.

The Yard and Transit Company filed its tariff with the Commission pursuant to the decree of this Court early in 1913. In 1917 it desired to make an increase in its charges for the loading and unloading service. Relying upon its status as a common carrier, appellant filed tariffs stating its proposed higher charges. This action precipitated a controversy between the Yard and Transit Company, the trunk line carriers, and the shippers. Faced with the necessity of justifying the higher charges, appellant filed with the Commission a tariff supplement which in terms cancelled its existing tariffs exactly as appellant has again done here. The Yard and Transit Company contended then, as it does again here, that it had ceased to be a common carrier because it had made a new lease of its tracks. The change then relied upon was a new lease to the Junction Company, under which

[1] This decision of the Court also shows how ineffective is the appellant's attempted distinction of *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498 (1911), on the sole ground that the wharfage facilities there involved were owned by a company which was affiliated with a transportation system. (Appellant's brief, p. 73)

the tracks which had been leased for fifty years were leased in perpetuity, and a flat rental of $600,000 a year was provided instead of the profit sharing basis previously in effect. *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209 (1919); R. 249.

The Commission suspended the operation of the appellant's notice withdrawing its tariffs and entered upon an investigation both of the proposal to withdraw the tariff and of the proposal to increase the charge for the service. During the progress of the investigation the Commission's suspension power expired (under Section 15(7)) and the appellant's cancellation notice became effective. Having thus succeeded in accomplishing the withdrawal of its tariffs, the appellant, taking advantage of its possession of the livestock as the delivering carrier, simply collected the additional charge from the shippers. Here again, in the event it is permitted to withdraw its tariffs, it proposes to collect increased charges.

At the conclusion of its investigation, the Commission held the appellant to be a common carrier subject to the Act and required it to refile its tariffs. *Livestock Loading and Unloading Charges*, 52 I. C. C. 209 (1919). Later in the same proceeding (58 I. C. C. 164 (1920)), an award of reparation was granted against the Yard and Transit Company, on the ground that the collection of the additional charge constituted an unreasonable practice by a common carrier subject to the Act. The validity of this award was sustained by this Court in *Adams* v. *Mills*, 286 U. S. 397, not decided until 1932. Under Section 16 of the Act reparation may be awarded only against common carriers subject to the Act. The effect of this Court's decision sustaining the Commission's award of reparation against the Yard Company, was to reaffirm its earlier finding that the Yard and Transit Company is a common

carrier and subject as such to the Interstate Commerce Act.

Following the decisions of the Commission in the proceedings just referred to, and subsequent to the 1922 lease, the appellant, recognizing and relying upon its status as a common carrier subject to the Act, repeatedly invoked the processes of the Act for the purpose of increasing its revenues: (1) *Loading and Unloading Livestock at Chicago,* 83 I. C. C. 248 (1923); (2) by filing tariffs effective December, 1934, stating increased charges for the loading and unloading service (R. 41); (3) *Livestock to or from Union Stock Yards, Chicago,* 222 I. C. C. 765 (1937).

The jurisdiction of the Commission over the appellant was again put in issue before this Court by appellant in *Atchison, Topeka & Santa Fe Railway Company* v. *United States,* 295 U. S. 193 (1935), generally referred to as the "*Hygrade* Case." In view of the contention which appellant so strongly urged upon this Court in the *Hygrade* case that it had divested itself of its common carrier status by the 1922 lease, the opinion of the Court therein constitutes its third decision holding appellant to be subject to the jurisdiction of the Commission.

The Yard and Transit Company performs certain so-called yardage services on livestock after the unloading service has been completed. For these services appellant collects its charges directly from the shippers pursuant to the tariff which it files with the Secretary of Agriculture. The Hygrade Packing Company brought a proceeding before the Commission to recover payments made to the Yard and Transit Company for yardage services on the ground that transportation and the Commission's jurisdiction do not end with the unloading of the stock but extend beyond that point and include the yardage services in question. The Yard and Transit Company, resisting that contention, took the position, as stated above,

that far from having jurisdiction over its yardage charges, the Commission no longer had any jurisdiction over it at all,—that as a result of the 1922 lease it had ceased to be a common carrier. The question before the Court, therefore, was the point at which the jurisdiction of the Commission over the plaintiff's services ends and that of the Secretary of Agriculture begins.

It was in this case, therefore, arising ten years after the execution of the 1922 lease, that appellant first took the position (R. 461-462, 701-712) that that lease had operated to divest it of its status as a common carrier and to remove it from the jurisdiction of the Commission, which is exactly the contention advanced here. To appreciate fully the significance of the Court's decision it must be understood that the appellant very largely devoted its brief and oral argument in this Court to that point, presenting in full elaboration precisely the argument again made here in respect to the effect of the 1922 lease. The judgment of the Court disposing of that contention, and fixing the boundary line between the jurisdiction of the Commission and that of the Secretary of Agriculture is expressed in the following language:

> "Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as now required by Section 15(5). Like the railroads, public stockyards are public utilities subject to regulation in respect of services and charges. *The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.*" (p. 201.)

This language is not open to misconstruction. The Court, after stating that public stockyards are subject to regulation, declares that the boundary line between the jurisdiction of the two administrative tribunals *over this appellant* is the point where transportation ends, namely,

with the unloading of the livestock into suitable pens. If the service of loading and unloading by the appellant, and its charges therefor, were not subject to the Commission's jurisdiction, the Commission's jurisdiction would not extend to the point where transportation ends, as the Court declares that it does, but would terminate short of that point.

In its report here before the Court, the Commission comments on the Court's decision in the *Hygrade* case as follows:

> "In the above case the Court had said that 'at least in respect of these shipments' transportation ended with unloading into suitable pens. While this does not purport to be a definite statement as to where transportation ends in the case of all shipments, it is a definite holding that the boundary of the Secretary's jurisdiction 'is the place where transportation ends,' and under Section 15(5) of the act it is clear that transportation could not end short of delivery into the unloading pens. The Court is speaking, it will be noted, of the charges of respondent and not of the railroads' rates and charges against shippers. (R. 39.)
>
> • • • • •
>
> "We do not think that a harmonious construction of the statute results from, on the one hand, an indisputable jurisdiction over the prescribed delivery into suitable pens, the same having to be treated as an inseparable part of the rail transportation to be furnished by the railroads without separate charge, and, on the other hand, the assumption that we are without jurisdiction over respondent in performing such part of the transportation and its charges therefor which must be included in the line-haul rate. The Packers and Stockyards Act, August 15, 1921, expressly provides that nothing therein shall affect our jurisdiction or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within our jurisdiction. It is plain that Congress did not intend a neutral zone of no jurisdiction over respondent's charges and it is equally plain from the statement above quoted from *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,*

that jurisdiction over respondent's charges to 'the place where transportation ends' was left with us." (R. 40.)

The decision of the Court in the *Hygrade* case is decisive of the issue again before the Court.

Although the decision in the *Hygrade* case was rendered in 1935, it is not the last of the decisions of this Court on the issue presented here. The question came again before the Court in *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470 (May 31, 1938). The Court again held the loading and unloading services performed by a stockyards company to be under the jurisdiction of the Commission and this decision was particularly relied upon by the District Court in the case at bar. (R. 160.)[1]

In the *Denver* case the Secretary of Agriculture, after investigation, established a rate base for the stockyards services performed by the Denver Union Stock Yards and in doing so excluded the loading and unloading facilities of that company, and refrained from fixing any charge for the loading and unloading service, on the ground that that service and the charges therefor, were under the jurisdiction of the Commission. The Secretary based his conclusion on the terms of the two statutes, on the report of the Commission now before this Court, and on the opinion of this Court in the so-called *Hygrade* case[2] discussed above. This Court sustained that action and in view of the Secretary's explicit reliance upon the order of the Commission

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[1] "* * * we are satisfied that the decision is [in] this case must be for the defendant; that the only question involved is one of jurisdiction and that, because of the definitions that are given to 'common carrier' and to 'transportation', the services rendered by the plaintiff make the plaintiff come within the provisions of the Interstate Commerce law. That is strengthened by the late decision of the Denver Stockyards case." (R. 160.)

[2] *A. T. & S. F. Ry. Co.* v. *U. S.*, 295 U. S. 193.

now before the Court it may be said, we think, that in practical effect the Court has already sustained this order of the Commission. The following is quoted from the report of the Secretary:

> "The Interstate Commerce Commission has decided that the service of unloading and loading livestock from and into cars is a common-carrier service subject to the provisions of the Interstate Commerce Act. (See I. C. C. Investigation and Suspension Docket No. 4109, page 342, of which judicial notice is here taken.)
>
> > " 'We are of opinion and find that respondent in the performance of these unloading and loading services is a common carrier subject to the provisions of the Interstate Commerce Act and as such is required to file tariffs with us covering its charges for unloading and loading livestock at its public stockyards in Chicago.'
>
> "The Supreme Court has ruled that the loading and unloading of livestock is a transportation service (295 U. S. 193). The Packers and Stockyards Act provides that nothing therein should affect the jurisdiction of the Interstate Commerce Commission or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within the jurisdiction of the Interstate Commerce Commission (Packers and Stockyards Act, 1921, Section 406). Inasmuch as the unloading and loading of livestock from and into cars is a railroad service, the charge therefor is for a railroad service and not a stockyard service." *Secretary of Agriculture* v. *Denver Union Stock Yard Co.*, Bureau of Animal Industry Docket No. 450, p. 10 (1937).

The three-judge court upheld the Secretary's order and *this Court* sustaining that action said:

> "Stockyard services do not commence until unloading ends; they end when loading begins. See *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 198. The court rightly refused to disturb the Secretary's ruling as to these facilities." (p. 477.)

The Court thus goes back to its decision in the *Hygrade* case as stating the boundary line which the Congress has established between the jurisdiction of the Commission and that of the Secretary.

We direct especial attention to appellant's futile effort to escape the conclusive force of this decision. (Appellant's brief, pp. 100, 101.) It is said that the Secretary entered no order fixing the rates for the loading and unloading service, from which "it follows that this Court correctly held that the loading and unloading facilities were properly excluded from the rate base," and that "the statements of the Court in its opinion must be read in the light of the question before it." The Secretary made no order fixing rates for the loading and unloading service, and excluded the value of the facilities from the rate base, solely because he found that the Commission had jurisdiction over those rates and facilities and that he, the Secretary did not have such jurisdiction. This Court sustained the Secretary's finding and we submit that appellant's own discussion of this case is convincing that it is decisive of the issue here.[1]

We believe the Court will find that the four decisions which we have discussed express the judgment of this Court on the issue again presented here. A few additional cases

[1]In the argument before the Commission in this proceeding appellant attempted to distinguish the *Denver* case on the ground that at that yard the loading and unloading facilities were leased to the railroads and it was pointed out that the District Court had so found. This finding of the District Court was erroneous. In their respective briefs in this Court the Government (page 23) and the Stock Yard Company (page 61) agree that this statement was error, and that the Yard Company leases certain trackage to the railroads but operates the loading and unloading facilities itself and receives its compensation on a per car basis. The error of the District Court was corrected by this Court at pages 476, 477.

in which the decision in *United States* v. *Union Stock Yard and Transit Company, supra,* has been cited and relied upon are significant.

In passing upon the validity of certain provisions of the Packers and Stockyards Act, in *Stafford* v. *Wallace,* 258 U. S. 495, 516 (1922), the Court said:

> "The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn* v. *Illinois,* 94 U. S. 113. *Nor is there any doubt that in the receipt of livestock by rail and in their delivery by rail the stockyards are an interstate commerce agency. United States* v. *Union Stock Yards Co.,* 226 U. S. 286."

It will be noted that this statement of the Court is quite inconsistent with the very narrow interpretation which appellant would place upon the 1912 decision of the Court in *United States* v. *Union Stock Yard and Transit Company, supra.*

In *The Tap Line Cases,* 234 U. S. 1 (1914), the Court, again citing its 1912 decision in the *Union Stock Yard* case, said:

> "• • • the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. *It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character.*" (p. 24.)
>
> "Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the State. • • • They are engaged in carrying for hire the goods of those who see fit to employ them. They are author-

> ized to exercise the right of eminent domain by the State of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers, a circumstance to be noticed in determining their true character. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286. They are engaged in transportation as that term is defined in the Commerce Act and described in decisions of this court." (p. 26.)

Counsel for the appellant rely upon *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434 (1915), in which the Supreme Court held a car company from which the railroads rented cars and received an icing service not to be subject to the Act. The difference between the vital terminal service performed by appellant and that of one selling services or supplies to the railroads under the circumstances which ordinarily attend such transactions, is exactly the difference between a business affected with a public use and a private business. The distinction between the two is emphasized by the statement in the *Ellis* case, as follows:

> "It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request • • •" (p. 443.)

As the Court here states, the trunk-line carriers may appropriately be charged with responsibility of providing necessary equipment and icing services. If they are unable to make satisfactory arrangements for such supplies or services with one agency they may do so with another, or they may supply the instrumentalities themselves. Wholly different is the situation with respect to the appellant's loading and unloading facilities which constitute the throat through which the livestock moving to and from the stockyards must pass. The trunk-line carriers

cannot satisfy the statutory requirement that transportation to public stockyards shall include delivery into suitable pens by making delivery at some other stockyards. Delivery must be made at the appellant's yards when the shipper consigns his livestock to that terminal. If Section 1 (3) and Section 15 (5) are directed at this appellant and place a duty directly upon it to perform the service which it alone can perform, those provisions of the law are meaningful and effective. We submit that that is the interpretation which must be placed upon them to sustain both their purpose and their constitutionality, because if they are interpreted as being directed, not to the appellant, but to the trunk-line carriers alone, they would require the performance of a service which the trunk lines are powerless to perform.

Although the Act defines the service performed by appellant both in general terms (Sec. 1 (3)) and in specific terms (Sec. 15 (5)) as transportation of livestock by railroad, appellant contends that it does not perform the transportation service as a common carrier because it does not *carry* stock. To assert that while engaging in transportation it does not *carry* is, we think, simply to deny what the statute affirms. The essence of appellant's contention, it appears, is that it does not operate locomotives or other motive power. There are many decisions of the courts, in addition to the four by this Court which we submit to be controlling, that an instrumentality of commerce need not operate motive power to be a common carrier. Many of these cases cite and rely upon the decision of this Court in *United States* v. *Union Stock Yard and Transit Co., supra.*

In June of this year the Supreme Judicial Court of Massachusetts held the Boston Terminal Company, which neither owns nor operates locomatives or cars, to be a com-

mon carrier under the Employers' Liability Act. *McCabe* v. *Boston Terminal Co.*, 22 N. E. (2d) 33 (June 30, 1939). The court there said:

> "The Federal Act, insofar as material, provides that 'every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages * * *'" (p. 35).
>
> "A part of the transportation furnished by the railroads began or ended in the defendant's terminal, and some came to and left the terminal in continuance of a single movement in interstate commerce. The defendant's property is private in ownership but public in use. Its premises are the instrumentality that the railroads are by law required to use in the conduct of their interstate and intrastate transportation of passengers, baggage and mail. The primary activity of the defendant is to facilitate and accomplish such transportation. It was performing services like those ordinarily performed by a common carrier and was in direct charge of all transportation occurring upon its premises. The terminal was a necessary link in the interstate system of every railroad that used it. *Batchelder & Snyder Co.* v. *Union Freight Railroad*, 259 Mass. 368, 156 N. E. 698, 54 A. L. R. 616; *Cott* v. *Erie Railroad*, 231 N. Y. 67, 72, 131 N. E. 737." (p. 36.)

In each of the following cases an agency performing necessary terminal services, but not operating any motive power, was held to be a common carrier, and in each reliance was placed upon the decision of this Court in *United States* v. *Union Stock Yard and Transit Co., supra.*

United States v. *Atlanta Terminal Company*, 260 F. 779 (C. C. A. 5, 1919), certiorari denied 251 U. S. 559.

Bordelon v. *New Orleans Terminal Co.*, 14 La. App. 60, 129 So. 452 (1930).

Spaw v. *Kansas City Terminal Railway Co.*, 198 Mo. App. 127, 201 S. W. 927 (1918).

In some of these cases it appears that the terminal companies designated the tracks on which passenger trains would load or unload, and in so doing, controlled train movements. Appellant controls train movements in the same manner. (R. 576, 577, 594, 595, and page 4, this brief.)

III.

THE SECRETARY OF AGRICULTURE DOES NOT HAVE JURISDICTION OF THE LOADING AND UNLOADING SERVICES PERFORMED BY APPELLANT.

Preliminary to this discussion of the jurisdiction of the Secretary of Agriculture, it should be noted that the existence since August 15, 1921 of the Packers and Stockyards Act can have no effect upon the proper construction of the Interstate Commerce Act. The portions of the Interstate Commerce Act establishing the jurisdiction of the Commission over the appellant were enacted prior to August 15, 1921, the date of the enactment of the Packers and Stockyards Act. The alternative before Congress in determining the scope of the jurisdiction of the Commission was either to vest it with the power to regulate the vital transportation services and the charges therefor over which appellant had and still has an absolute monopoly, or to have them wholly unregulated. That Congress decided that regulation was necessary is clear both from the express terms and from the purposes of the Commerce Act.

A. APPELLANT'S ASSERTION THAT THE SECRETARY OF AGRICULTURE HAS JURISDICTION OF THE LOADING AND UNLOADING SERVICES IS (1) CONTRARY TO THE POSITION ORIGINALLY TAKEN BY IT IN THIS PROCEEDING, (2) IT IS CONTRARY TO THE TERMS OF THE GOVERNING STATUTES, (3) IT IS CONTRARY TO THE SECRETARY'S OWN DECISION RESPECTING HIS JURISDICTION, AND, FINALLY, (4) IT IS CONTRARY TO THE CONTROLLING JUDGMENT OF THIS COURT.

(1) In asserting that the Secretary of Agriculture has jurisdiction of the loading and unloading service and that it will file tariffs with the Secretary covering this service, if relieved of jurisdiction by the Commission, appellant is taking a different position from that originally taken by it before the Commission in this proceeding.

Appellant's General Manager and Vice President testified before the Commission as follows:

> "Q. In your testimony in Docket 4109 you said that if the Yards Company was permitted to withdraw these tariffs on file with the Commission, that the determination of the amount to be paid by the carriers for the loading and unloading service would be a matter of barter and trade between the Yards and the yards railroads. Is that still your position?
>
> "A. I said it at that time, but in the development of our plans it may well be that the charges will all be subject to the Secretary of Agriculture and will be arrived at by or with his approval.[1]
>
> "Q. What are those plans that will produce that result which you mention, or to which you refer?
>
> "A. It would be very difficult to state what all those plans are." (R. 312-313.)

Upon the submission of the matter to the Commission in Docket 4109, its attention was directed to the position in which the trunk-line railroads and the shippers

[1]The testimony before the Commission in the first proceeding is not before the Court, but this statement of the witness indicates the original position, and the real purpose of appellant.

would be placed if the Yard and Transit Company, having a monopoly in the performance of this vital terminal service, and having physical possession of the livestock, by which to enforce its demands, should have the unregulated power to collect for its services whatever in its mercy it might choose to demand. After the Commission's first decision herein (R. 28), the appellant reconsidered the wisdom of conceding that its purpose in seeking to defeat the jurisdiction of the Commission, was to free itself from all regulation. Recognizing the opposition which must exist to the view that an agency having a complete monopoly in the handling of livestock into and out of the largest market in the world should be in a position to dictate, free from restraint, the terms upon which it would perform that necessary public service, the appellant has changed its tactics. Although there has been no change in the law, appellant now argues as one of its major contentions that its loading and unloading services must be and are subject to regulation, that its charges for these services are simply on file with the wrong administrative body, that it seeks release from the jurisdiction of the Commission only that it may file its proposed increased charges with the Secretary of Agriculture. Release of the appellant from the jurisdiction of the Commission would free appellant from regulation, just as it would have done three years ago when appellant conceded that to be its objective. The Secretary has no jurisdiction over the service under the Packers and Stockyards Act, and the Secretary himself and this Court have so held.

(2) Section 406 of the Packers and Stockyards Act is as follows:

> "Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission." (7 U. S. C. Sec. 226.)

The Packers and Stockyards Act applies *to stockyards*. Here is clear legislative recognition that Congress had already given the Commission jurisdiction over stockyard owners with respect to certain matters, which jurisdiction it did not intend to disturb. The decision of the Supreme Court holding this appellant to be a common carrier in respect to its loading and unloading service had been rendered long before the Packers and Stockyards Act was passed, and the Commission was then and had been for years exercising jurisdiction over the appellant's loading and unloading services and the charges therefor. Jurisdiction over the loading and unloading services and charges is the only jurisdiction of the Commission *over stockyards* to which Section 406 of the Packers and Stockyards Act could have referred. Only the year before the enactment of the Packers and Stockyards Act, Section 15 of the Interstate Commerce Act had been amended to provide specifically (in paragraph 5) that transportation of livestock from and to public stockyards includes the loading and unloading of the stock. These facts explain and nothing else can explain, the declaration of Congress that the new jurisdiction conferred upon the Secretary over stockyards would not affect the existing jurisdiction of the Commission over stockyards.

(3) In 1937, during the pendency of this proceeding, bills were offered in the 75th Congress (S. 2129, H. R. 6732) which were designed to legislate the change in the Interstate Commerce Act which this Court is now asked to make by the construction of the Act. The specific, and the only purpose of these bills was to transfer jurisdiction of the loading and unloading service performed by stockyards companies from the Interstate Commerce Commission to the Secretary of Agriculture. The representatives of the appellant appeared at the hearings before the Senate Sub-Committee on Agriculture and Forestry in support of this

change in the law, and all of the large associations of livestock producers and shippers,[1] and the Association of American Railroads appeared in opposition to the proposal to take from the Commission its jurisdiction over stockyards in respect to the loading and unloading service performed by them. Upon request of the Chairman of the Senate Committee on Agriculture and Forestry, the Secretary of Agriculture addressed a letter to the Chairman in respect to the proposed legislation. This letter, as set forth in the official public record of the hearings of the Sub-Committee on Agriculture and Forestry of the United States Senate on S. 2129 (75th Congress, 1st Session), p. 6, reads in part as follows:

> "This amendment would remove from the control of the Interstate Commerce Commission and place under the jurisdiction of the Secretary of Agriculture the loading and unloading of livestock into and from railroad cars at those markets which are subject to the Packers and Stockyards Act, 1921. *Under the law as it now stands such loading and unloading are under the jurisdiction of the Interstate Commerce Commission, since the Interstate Commerce Act provides that railroad transportation of livestock shall include delivery at public stockyards of inbound shipments in suitable pens and the receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee, or owner.* 49 U. S. C. Sec. 15 (5). While the duty is thus placed upon the railroads, it is actually performed for them by the stockyards; but, being a transportation service, the Interstate Commerce Commission has held that it has the power to say what the stockyards shall charge therefor. *That view of the law was upheld by the Supreme Court of the United States in Atchison, Topeka & Santa Fe Railway Co. v. United States,* 295 U. S. 193. *This Department, therefore, does not undertake to fix*

[1] American National Livestock Association, National Livestock Marketing Association, National Wool Growers Association, Texas and Southwestern Cattle Raisers Association, Texas Sheep and Goat Raisers Association, Highland-Hereford Breeders Association, Livestock Traffic Association.

rates and charges for that service. There is, accordingly, no conflict in this matter between the Commission and this Department." (Italics ours.)

Subsequently, in his formal order in the *Denver Union Stock Yard* Case, *supra*, the Secretary held that he had no jurisdiction over stockyards in respect to the loading and unloading service performed by them.[1]

(4) In *Denver Union Stock Yard Co.* v. *United States*, decided May 31, 1938, 304 U. S. 470, this Court has sustained the finding of the Secretary that he does not have jurisdiction of stockyards in respect to the loading and unloading services performed by them.[2] This decision is conclusive. If the Commission should now be held to lack jurisdiction, those transportation services and charges will be wholly unregulated.

B. UNDER APPELLANT'S THEORY THERE WOULD BE DUAL JURISDICTION BY THE COMMISSION AND BY THE SECRETARY OF AGRICULTURE OVER THE LOADING AND UNLOADING SERVICE, AND ADMINISTRATIVE CONFLICT AND CONFUSION WOULD BE INEVITABLE.

Appellant contends that it is not subject to the Interstate Commerce Act and has no duty to the shippers thereunder. It is asserted that the trunk lines alone have a duty to the shipper under Sections 1 and 15 of the Act to load and unload the livestock as a part of the transportation service; that the appellant's only duty is under the Packers and Stockyards Act, and that that duty is to perform the loading and unloading service for the trunk lines, as their agent, for charges to be filed with the Secretary of Agriculture. Since the terms of Sections 1 and 15 of the Interstate Commerce Act so clearly make the loading and unloading service transportation by railroad, appellant recog-

[1] See page 44 of this brief.

[2] See pages 43-45 of this brief.

nizes that its argument that it is subject only to the Packers and Stockyards Act forces it to construct some theory under which both the Commission and the Secretary would have jurisdiction of the loading and unloading service and the charges therefor. We find this theory stated (on page 100 of its brief) in the following language:

> "As Mr. Commissioner Eastman stated in the above excerpt from his dissenting opinion, the loading and unloading service, as between the railroad and the shipper, is a transportation service subject to the jurisdiction of the Commission, but, as between the railroad and the stockyard company, it is a stockyard service subject to the jurisdiction of the Secretary of Agriculture."

Any effort to give practical effect to such a construction of these Acts would create administrative conflict and intolerable confusion.

If the appellant refused to perform the loading and unloading service, or failed to perform the service in a manner satisfactory to the shipper, and the shipper, relying upon the requirement of Section 15(5) that transportation shall include "delivery into suitable pens", complained to the Interstate Commerce Commission, the Commission, under appellant's theory would be powerless to correct the evil. Deprived of its jurisdiction over appellant which alone owns and operates the facilities necessary to effect delivery, the Commission could issue an order only against the trunk lines; and such an order would be wholly nugatory because the trunk lines would be incapable of making it effective. If the Commission found that the requirements of the Interstate Commerce Act were not being satisfied, the Commission itself, the shippers, or the line-haul carriers would then have to institute proceedings against the appellant before the Secretary of Agriculture, but under appellant's theory the issue before the Secretary would not be the rights of the

shippers under the Interstate Commerce Act, or the duty owed to them by the line-haul carriers under that Act, but rather the duty of the appellant to the trunk lines under the Packers and Stockyards Act. These respective duties would arise under different statutes and would be interpreted and administered by different tribunals. In short, on appellant's theory, the right of the shippers to the service would arise out of and be measured by the terms of the Interstate Commerce Act, but could be enforced not by proceedings under that Act, but only through a second proceeding under a different statute and before a different tribunal. What the shippers had a right to demand under the Interstate Commerce Act before the Commission might be found to be very different from what the appellant was required to furnish under the Packers and Stockyards Act as found by the Secretary of Agriculture.

Such a hopelessly confused situation involving probabilities of a complete administrative stalemate could not have been the intention of Congress at the time the Packers and Stockyards Act was passed, and this is shown by the provision of the Act expressly reserving the Commission's jurisdiction over stockyards. Obviously it could not have been the intention of Congress at the earlier date when Section 15(5) was passed, and before the enactment of the Packers and Stockyards Act, to leave wholly unregulated the Yard and Transit Company's performance of these services, and the charges therefor, which were explicitly defined as a part of transportation by railroad. Especially is this true since the intention of the shippers and of the Congress, as declared by Senator Cummins, was to place "the whole subject within the jurisdiction of the Interstate Commerce Commission."[1] Yet both of these conclusions would be necessary under appellant's theory.

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[1]See page 20, *supra*.

Appellant's whole case culminates in a theory to dispose of which the Court need only attempt to envisage its practical application.

C. TO REMOVE THE DELIVERY SERVICE PERFORMED BY APPELLANT FROM THE JURISDICTION OF THE COMMISSION WOULD DISRUPT A COMPLETE SYSTEM OF FEDERAL REGULATION AT A VITAL POINT.

Since the decision of this Court in 1912, the Commission has regulated the rates for the delivery service performed by the appellant and has thus exercised complete jurisdiction over the transportation of livestock from the country station where it originates until the animals have been placed in suitable pens in the Union Stock Yards. But Federal regulation of the handling of livestock in interstate commerce does not end there. Since the passage of the Packers and Stockyards Act in 1921 the Secretary of Agriculture has exercised complete jurisdiction of the handling of the animals within the yards. There has been a complete correlation between the regulation of the Commission and that of the Secretary. The Commission had been regulating the loading and unloading service and charges for years when the Packers and Stockyards Act was passed and the Congress provided in that Act that nothing therein would affect the jurisdiction of the Commission over stockyards. From the outset the Secretary has given full recognition to the clear purpose of that provision of the Act. There has been no overlapping of their respective jurisdictions. Both tribunals have recognized, and the Supreme Court has held, that the jurisdiction of the Commission ends after the unloading, and that it is not until the unloading service has been performed that the jurisdiction of the Secretary begins.[1] There exists, therefore, a unified pat-

[1] *Denver Union Stockyard Co.* v. *United States*, 304 U. S. 470 (1938); *A. T. & S. F. Ry. Co.* v. *U. S.* (The *Hygrade* case), 295 U. S. 193 (1935).

tern of Federal regulation governing the handling of livestock in interstate commerce from the time it is loaded at the country station until it passes out of the stockyards at the central market.

In seeking immunity from regulation, plaintiff is forced to contend that there is a defect in this regulatory fabric which leaves the Commission powerless to require the performance of or to prescribe the charges for the vital delivery service necessary to complete the transportation of the stream of livestock, moving to and from the Chicago livestock market.

IV.

THE STATUS OF APPELLANT UNDER THE ACT IS UNAFFECTED BY ANY CONSIDERATION OF WHETHER OR NOT IT PERFORMS THIS TERMINAL SERVICE ON LIVESTOCK AS AGENT OF THE TRUNK LINE RAILROADS.

Throughout its brief appellant emphasizes the contention that it performs this terminal service on livestock as the agent of the trunk lines.[1] This Court has held that a

[1] In the performance of this terminal service on livestock, appellant does not act as the agent of the trunk lines in any true sense of the word. We are content, however, merely to state our position on the question because under the view taken by the Supreme Court, *Adams* v. *Mills*, 286 U. S. 397, it is immaterial to this inquiry. It is elementary that an agency exists only when one acts for or represents another, by the latter's authority,—it is the product of contract either express or implied. The circumstances under which the Yard performs the service of loading and unloading are accurately described by the appellant itself, in the statement in its brief before the Commission of August 20, 1935 (p. 10), that "this service (of loading and unloading) is made necessary by the fact that the trunk line carriers do not themselves own facilities at the stockyards *through which the requirement of the statute* can be made by them." As appellant there states, the basis for its participation in the transportation service is derived not from the consent of the trunk lines, but solely from its dominant, physical position, and from the operation of the statute.

common carrier under the Act may perform its common carrier services in the capacity of agent of other railroads[1] and that its status under the Act is unaffected thereby.

Appellant seeks to avoid any direct attack upon the soundness of this view of the Court. But it seeks indirectly to impeach the principle stated by the Court by the argument that "Congress either intended by the provisions in question to make all such agents common carriers or it did not. If any are, all are; and if one is not, none is." (Appellant's Brief, p. 49.) The gist and the direction of this argument is that if appellant, acting as agent of the trunk lines, is a common carrier, all agents of common carriers must also be held to be subject to the Act, with the result that there would be brought within the scope of the Act and the jurisdiction of the Commission a vast number of miscellaneous agencies which Congress could not have intended to regulate.

Faced with the categorical statement of the Court in *Adams* v. *Mills, supra,* directed at the appellant's own status, appellant is unwilling to argue directly that it does not have the status of a common carrier under the Act *because* (as it contends) it acts only as the agent of the trunk lines. Rather, it prefers an oblique attack upon the principle stated by the Court by declaring that if it is subject to the Act it necessarily follows that all the miscellaneous agencies to which it refers must also be subject to the Act, and that Congress did not so intend. Neither did this Court

[1] In *Adams* v. *Mills*, 286 U. S. 397, 415 (1932) the Court *speaking of this appellant* said: "Nor was the issue affected in any manner by the status of the Yards Company as a common carrier. It did not follow from such status that it could not act as an agent of the line-haul carriers • • • ." The same principle is stated in *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366 (1925); *U. S.* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296 (1919); *Southern Pacific Terminal Co.* v. *I. C. C., et al.*, 219 U. S. 498 (1911).

so intend. The Court held that "it did not follow from such status [—the status of the Yard and Transit Company as a common carrier—] that it could not act as an agent of the line haul carriers" (p. 415). In other words appellant is contending in effect that the principle which the Court thus applied to appellant would bring all agents performing service for the trunk lines within the purview of the statute; that Congress did not so intend, and that the finding of the Court is therefore erroneous.

In its report before the Court the Commission states:

> "We do not entertain the view that every terminal agency, performing for the railroads some service falling within the definition of 'transportation' contained in Section 1(3) could, or should, be held to be a common carrier subject to the Act. The views expressed relate to the subject matter which is before us, namely, the services performed by the Union Stock Yards, and rest, not only on the Union Stock Yards case, *supra*, but also on the language of Section 15(5), and the giving of harmonious effect to its purpose." (R. 39.)

Referring to this statement the appellant says:

> "* * * The Commission disavows giving to the Act an interpretation whereby all persons performing transportation services as agents of a carrier thereby become themselves common carriers, but suggests no rule of interpretation by which some thereby become common carriers and others not." (Appellant's brief, p. 49.)

Neither did this Court in *Adams* v. *Mills* think it necessary to state the "rule of interpretation" by which some thereby become common carriers and others not. It was the duty of the Interstate Commerce Commission to pass upon the status of appellant on the facts pertaining to appellant and not to provide a general rule of thumb by which to determine which, if any of the miscellaneous agencies referred to by the appellant are within the scope of the Act. Appellant cannot deny however that in the long

period that the Commission has regulated the appellant, a practical line of demarcation has actually been drawn between the business of the appellant and that of the many agencies to which appellant refers. It is necessary only to name some of the other services to which appellant refers (Appellant's brief, p. 60) to see that they all stand on a different footing from that performed by appellant. None of the agencies to which appellant refers, except those performing the loading and unloading services at public stockyards, have such a monopoly as to give them an absolute veto power over the completion of the transportation service which the Act requires. The Commission's control over the appellant has already been exercised not only without injury to the public interest, but in the protection of that interest for more than 25 years. The argument that if that jurisdiction is not now terminated a great number of miscellaneous agencies will be brought within the jurisdiction of the Commission, presumably with dire results, reaches it high-tide in the statement that "Congress did not intend that every village drayman performing transfer service between railroad stations should be required to keep his books in accordance with the accounting rules of the Commission or compelled to apply to it for authority to place a mortgage on his home." (pp. 61, 62.)

As appellant argues, the Congress may not have intended to subject to the jurisdiction of the Commission the contract under which the village drayman undertakes to perform certain services for the railroads. But appellant owes its participation in the transportation service not to private contract, but to a statute which requires that livestock moving in interstate commerce be delivered, if so consigned, upon the appellant's property, and the fact that no one else can perform the required service of delivery. Only by means of the services and facilities of appellant

can the great stream of livestock be transported to and from the Chicago market, and this makes the business of appellant a public business. That Congress did not intend to regulate the private contract with the village drayman falls short of showing that Congress did not find regulation of the appellant to be essential in the public interest.

The decision of the Court in *Adams* v. *Mills, supra,* disposes of all appellant's various arguments which derive from its contention that in the transportation of livestock by railroad, as those terms are defined in the statute, it acts only as agent.

V.

THE APPELLANT HAS TWICE BEEN ACCORDED A FULL AND FAIR HEARING BY THE COMMISSION.

The appellant's argument that it was denied a full hearing is without foundation. It was given full opportunity, both in the 1935 and the 1937 proceedings, to introduce any evidence it wished regarding its corporate history, its properties, its tariffs, and its operations, past and present. But in the last hearings it attempted to go much further and to force the Commission to take evidence and try out in this proceeding the status under the Interstate Commerce Act of 135 other stockyards and of a great many other companies engaged in a variety of businesses. It sought to offer evidence as to "the tariffs and practices in the handling of cotton in the southwest" and the status under the Act of the many agencies handling such cotton. (R. 564, 567-568) It sought to force the Commission to investigate the situation respecting "independent contractors, lighterage companies, wharf companies, dock companies" at "all of the ports in the United States". (R. 568) Such an inquiry would have been entirely pointless on appellant's own theory, unless the Commission had be-

fore it facts sufficient to enable it to formulate a judgment as to the status under the Act of each of such miscellaneous agencies. The Commission's refusal to turn this case, in effect, into a nationwide general investigation, and its refusal to accept evidence which would be pertinent only to such an investigation, does not constitute a denial of a full hearing to the appellant. To pass upon the status of these hundreds of other agencies, as demanded by appellant, the Commission must have called before it the parties affected and permitted them to be heard, or it must have reached a judgment as to their status in their absence, and upon such evidence as the appellant was pleased to offer. We submit that the Commission was not bound to do either in order to pass upon the single issue precipitated by appellant, as to its right to withdraw its tariffs.

Appellant complains first that the evidence sought to be introduced was relevant and material and its rejection erroneous, second, that it was improperly denied the right to make an adequate record for the review of this question, and third, that it was not permitted to identify and offer exhibits presenting its evidence on this subject.

A. THE DISTRICT COURT HAS RIGHTLY HELD THAT THE REJECTION OF THIS EVIDENCE BY THE COMMISSION DID NOT DEPRIVE APPELLANT OF A FULL AND FAIR HEARING.

To support the admissibility of this evidence appellant purports to rely upon the familiar rule that in the interpretation of ambiguous statutes a uniform interpretation of the administrative authority is entitled to weight, citing *Louisville & Nashville R. R. Co.* v. *United States*, 282 U. S. 740, 757 (1931), and the *Pocket Veto Case*, 279 U. S. 655, 689 (1929). But appellant did not seek to show a uniform practice or interpretation by the Commission. Appellant did not and could not deny that for more than twenty-five years the Act has been uniformly construed by the Com-

mission and by the Court as subjecting the appellant to the jurisdiction of the Commission, adversely to appellant's present contention as to its status.

In 1912 the Commission caused the institution of proceedings resulting in the determination by this Court that the provisions of the Interstate Commerce Act place the Yard and Transit Company under the jurisdiction of the Commission. *United States* v. *Union Stock Yard and Transit Company of Chicago*, 226 U. S. 286 (1912). Since that time, and prior to its decision here, the Commission frequently had occasion to consider the status of the Yard and Transit Company under the Act, and had consistently construed the Act to apply to that Company.[1] The uniform construction thus placed upon the statute by the Commission over a period of many years is that the Act places the Yard and Transit Company under the jurisdiction of the Commission. If there are other stockyards where the conditions are in all respects similar to those at Chicago, and if the Commission has not taken action to require the filing of the tariffs of those companies, those facts would at most tend only to show that the Commission had not yet corrected all violations of the Act. But they would not, and, in the face of the decisions cited above, could not show that under the uniform practice and interpretation of the Commission a company such as the Yard and Transit Company was not subject to its jurisdiction.

In its argument on this point appellant cites *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 118 (1914) in which action was brought against the railroad in the Superior Court of Massachusetts to recover for the loss of

[1] *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209 (1919); *Live Stock Loading and Unloading Charges*, 58 I. C. C. 164 (1920); *Live Stock Loading and Unloading Charges*, 61 I. C. C. 223 (1921); *Loading and Unloading Live Stock at Chicago*, 83 I. C. C. 248 (1923); *Livestock To or From Union Stock Yards*, 222 I. C. C. 765 (1937).

baggage. The Court held that a requirement published by the Interstate Commerce Commission in its official tariff circular, and intended for general application, constituted an interpretation of the Act in question and was admissible. But in the *Hooker* case no one attempted to impeach the Commission's formal interpretation of the Act by offering evidence purporting to show that certain parties had not observed the requirement stated in the tariff circular. That is what is attempted here and the *Hooker* case is not in point.

In *Adams* v. *Mills*, 286 U. S. 397, the Court sustained an award of reparation against the appellant under Section 16 of the Interstate Commerce Act. In the course of its opinion the Court said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at *these yards*; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311." (pp. 409-410.)

The question must be determined, said the Court, in respect to the particular situation existing at Chicago, and the conditions at other markets were wholly immaterial:

> "Certainly the Commission could reasonably determine upon this evidence that conditions with respect to live stock in Chicago justified a different rule from that obtaining in other places; that, in fact, a different practice had prevailed; and that no reason existed for permitting a departure from that practice." (pp. 414-415.)

Neither in *Adams* v. *Mills* nor in its 1912 decision did the Court concern itself with the question whether some company not before it was violating the Act as construed by it in these decisions.

A decision of the Ninth Circuit Court of Appeals (certiorari denied) in a case arising before the Federal Trade Commission is singularly apposite here. *Hills Bros. Co.* v. *Federal Trade Commission*, 9 F. (2) 481 (C. C. A. 9, 1926), cert. den. 270 U. S. 662. It was there held that a Commission acting to prevent a violation of the statute by the party before it, cannot be forced in that proceeding to pass upon the status under the Act of all others to which the defendant may desire to direct attention. The court stated the facts and its ruling as follows:

> "The petitioner also offered to prove that a concern in Los Angeles was selling coffee, and that publishers throughout the country were selling magazines, at fixed prices in other states, under agreements to maintain these prices, and refused to sell to dealers who would not maintain the prices agreed upon. An objection to this class of testimony was sustained, and the ruling is assigned as error. If the concerns in question did nothing more than the petitioner has done, according to its own contention, they did not violate the law, nor has the petitioner violated the law, for reasons hereinafter stated. If, on the other hand, the petitioner has violated the law, it would avail nothing to prove that others were equally guilty. Proof of the methods employed by others would be of little avail in any event, unless the methods employed were similar, and in order to determine the similarity of methods the commission would be compelled to hear and try many cases, instead of only one. There was no error in the rulings complained of." (pp. 484-485.)

We submit that the proffered evidence was not material to a determination of the status of appellant, was not competent as the basis for any conclusion as to the status of agencies not parties to the proceeding, and was properly rejected.

It should be pointed out, too, that a rule requiring the Commission to enter upon such an investigation as that demanded by appellant here would produce grave administrative difficulties. To force the Commission to receive evidence and to determine the status of hundreds of other businesses before it could rule upon the right of the applicant to withdraw tariffs from the Commission, would result in an administrative paralysis and defeat the purposes of the Act. Such a sweeping nationwide investigation as the appellant demanded in this case, assuming that the parties affected would be given full opportunity to be heard, could not be completed within the period of seven months during which the Commission had power to suspend the operation of appellant's cancellation tariff. (49 U. S. C. Sec. 15(7).) Certainly the Act's provision for a full hearing does not require the Commission to enter into such an investigation that the withdrawal action which precipitated the proceeding would become effective long before the Commission could make its order with reference thereto. Nor can it be intended to place the Commission and the public at the mercy of the respondent's voluntary decision on whether it would extend the effective dates of its cancellation notice. It should be recalled in this connection that on a previous occasion when the appellant sought to withdraw its tariffs, and the hearings before the Commission in respect to the validity of that action became protracted, appellant declined to postpone the effective date of its cancellation notice, which thereupon became effective (page 19, this brief).

The Act contemplates that the Commission shall determine when and under what circumstances general investigations shall be undertaken by it. (Sec. 13(1), (2).) In this connection it may be noted that on the same day that the Commission decided this case, July 11, 1938, it entered an order upon its own motion instituting a general

nationwide investigation into the status of stockyard companies as common carriers by railroad subject to the Interstate Commerce Act to determine whether said stockyard companies "are violating any provisions of the Interstate Commerce Act."[1] Extensive hearings have been

[1] "ORDER.

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of July, A. D. 1938.

"EX PARTE 127. STATUS OF PUBLIC STOCKYARD COMPANIES.

"The Commission having under consideration the subject of the status of public stockyard companies, in respect of the transportation services performed at the stockyards of said companies, in connection with the unloading and loading of carload shipments of live stock transported by railroad in interstate commerce to and from the public yards of said stockyard companies; and the relations between said stockyard companies and common carriers by railroad, and between said stockyard companies and persons or corporations receiving at or shipping from said public stockyards live stock transported by railroad in interstate commerce to and from said stockyards:

"*It is ordered*, That the commission, upon its own motion, enter upon an investigation into and concerning the status of said stockyard companies as common carriers by railroad subject to the Interstate Commerce Act, in respect of the transportation services performed at said stockyards in connection with the unloading and loading of carload shipments of live stock transported by railroad in interstate commerce to and from the public yards of said stockyard companies, said investigation to include a full inquiry into

"1. The relation, direct or indirect, between any of said stockyard companies or their officials and (a) common carriers by railroad, and (b) any person, firm or corporation receiving at or shipping from said stockyards live stock transported by railroad in interstate commerce to and from said stockyards.

"2. The management or operation of said stockyard companies by common carriers by railroad, or by officials, employees or subsidiary or affiliated companies of common

held in this proceeding and the hearings are not yet concluded. Thus the Commission has itself proceeded in an appropriate investigation, and on due notice to the parties affected, to ascertain the conditions at other stockyard companies and to determine their status. In no circumstances would it have been proper for the Commission to have formulated a judgment as to their status except in a proceeding in which they had been made parties.

B. THE RECORD CLEARLY PRESENTS FOR REVIEW THE QUESTION OF THE ADMISSIBILITY OF THE EVIDENCE WHICH THE COMMISSION DECLINED TO RECEIVE.

All of the parties to the proceeding except appellant recognize that the question as to the admissibility of this evidence which has been squarely passed upon both by the Commission and the District Court, is clearly raised by the record and may properly be considered and passed upon by this Court. Presumably this is the result which appellant also must desire.

That the record does show the character and purpose of the excluded evidence is conclusively established, we believe, by a comparison of the appellant's own description of the excluded evidence, as set forth in its complaint (R. 8-11) with the description of that evidence by the Commission in its report (R. 25, 26; Appellant's Brief, pp. 106-107).

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carriers by railroad, and the management or operation of common carriers by railroad by said stockyard companies, or by officials, employees, or subsidiary or affiliate companies of said stockyard companies.

"3. Operating practices in connection with the transportation services performed by said stockyard companies.

"4. Whether said stockyard companies are common carriers by railroad subject to the provisions of the Interstate Commerce Act in respect of the transportation services performed by them, or are violating any provisions of the Interstate Commerce Act. * * *"

Appellant experienced no difficulty in apprising the District Court of the character of the evidence which it proposed to produce and it has experienced no difficulty in doing so in its brief in this Court. It was manifest at the hearing and the record shows that appellant's real complaint is not that it was denied the right to make an offer which undoubtedly preserved the question for review, but rather that it was not permitted, under the guise of making an offer to prove, to put into the record in question and answer form, and in full length the detailed showing which it had prepared on this subject exactly in the form in which it had been prepared. The presiding Commissioner at the first hearing[1] (R. 273, 274) and the presiding Examiner at the subsequent hearing[2] (R. 381, 389, 515) were not only at all times ready to receive, but repeatedly urged counsel for appellant to offer, a description of the nature and purpose of the evidence sought to be introduced. After prolonged efforts to incorporate in the record the full showing prepared in the form in which it had been prepared, together with the many ex-

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[1] "Commissioner Splawn: I sustain the objection and will ask Mr. Shaw when you offer testimony that you merely state the character of it and not undertake to put on the record the details which you would like to have the witness testify to." (R. 273)

"Commissioner Splawn: Now, Mr. Shaw, you are a very able and skilled counsel. You are here to help the Commission. I ask you to state the general purpose of your testimony and not to undertake yourself to testify." (R. 274)

[2] "Exam. Carter: I will sustain the objection and I want to state here that these offers giving the details of the testimony are not going to be accepted. In other words we will accept, if you will make your general offer of proof of what you want to prove without showing in detail what the proof is, we will accept that offer of proof, but I am not going to accept offers of proof in great detail." (R. 389)

hibits included in the showing, *exactly as if the entire showing had been found admissible and received in evidence,* counsel did finally make a record which leaves no possible doubt as to the question presented by the offer.

The Court should know how full has been the Commission's consideration of the admissibility of this evidence. After the Commission's decision in Docket 4109 (*Livestock Loaded and Unloaded at Chicago,* 213 I. C. C. 330 (1935) (R. 28)) appellant filed a petition to reopen the proceeding for the purpose among others, of taking evidence bearing upon the status of other yards, *no such evidence having been offered by appellant at the hearing in that proceeding.* In the petition referred to appellant sets forth the nature and purpose of the evidence it proposed to produce regarding twelve illustrative yards. (R. 712, 723-727) The Commission denied the petition and declined to reopen the case. As stated elsewhere, appellant obtained a rehearing by withdrawing its cancellation notice and then refiling it. (R. 23, 24)

At the first hearing in the second proceeding, evidence of this character was offered, and after argument concerning its admissibility, Commissioner Splawn, then presiding, refused to permit the appellant to enter upon the introduction of this material and to incorporate in the record the full showing prepared and in the form in which it had been prepared. (R. 273) As stated above, the Commissioner, however, did urge counsel for the appellant to state for the record the nature and the purpose of the showing which he desired to introduce. (R. 273-274)

At a later hearing, after the appellant had again attempted to incorporate in the record the testimony and exhibits which had been prepared concerning other stockyards and agencies, the Examiner heard statements by appellant's witness and its counsel describing the proposed evidence, and listened to extended arguments on the ad-

missibility of the showing in which statements and argument the appellant fully set forth the character and purpose of the data in question. (R. 381, 383-392, 433-440, 446-470, 486-488, 491-538, 564-568.)

One of the many companies covered by appellant's showing (the Sioux City Stock Yards Company) was taken as illustrative and counsel for appellant made a full statement detailing the 23 exhibits it proposed to offer in connection with that company alone.[1] (R. 511-513) The nature and relevancy of that evidence was then fully discussed, the discussion occupying pages 515 to 538 of the record. No purpose except delay could have been served by going through the same procedure for each of the other companies.

At the close of the hearings, appellant filed with the Commission a petition for a further hearing before submission, and for an order requiring the Examiner to permit the introduction of the evidence. The petition occupies thirty-five pages of the record on this appeal (R. 164-199), and fully sets out the character of the data in question. After due consideration, the Commission refused to

[1] "Exam. Carter: Why can you not make your argument as to admissibility now? What is to prevent you from doing that?

"Mr. Gladson: I will make my argument as to Sioux City, and perhaps that will be determinative of similar evidence.

"Exam. Carter: I did not hear that.

"Mr. Gladson: I say I will be glad to cover the Sioux City situation and possibly Sioux City will be determinative of what the Examiner will do in connection with the other * * *.

"Exam. Carter: Live stock markets?

"Mr. Gladson: * * * Live stock markets. I assume that probably is true, but I am going to make an offer, if the ruling is adverse, to make a showing at these other yards." (R. 515)

broaden the scope of this case by entering upon an investigation, national in scope, of the conditions and status of these other companies. (R. 199)

Again, in its exceptions to the Examiner's report, appellant argued the exclusion of this evidence and again set out at length its character and purpose. (R. 200, 207-211, 224-225) Again the Commission considered the relevancy of the evidence, and again found it to be irrelevant. (R. 22, 25, 26) Appellant then complained to the three-judge District Court of the Commission's refusal to receive this evidence, setting out the nature and the purpose of the rejected showing. (R. 8-12, 14) After full argument, the court sustained the Commission's rejection of the evidence. (R. 116)

C. THE EXAMINER AUTHORIZED THE APPELLANT TO MARK ITS EXHIBITS FOR PURPOSES OF IDENTIFICATION BUT THE APPELLANT FAILED TO DO SO.

Appellant's third point in respect to the evidence is that appellant was not permitted to have its excluded exhibits marked for identification. (Appellant's brief, p. 104) *This statement is untrue.* The Examiner did authorize the marking of the exhibits for purposes of identification, stated that he would permit the designation to appear in the record, and advised how they could be brought to the attention of the Commission. Appellant has omitted a very important part of the Examiner's rulings which we supply below.[1]

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[1] "Mr. Carter: If you want me to give marks to the exhibits that you may more readily refer to those exhibits, I will give certain marks but I will not continue the marks in the succession of the exhibits which are received in evidence in this case. If you want to do that, I will do that, for your convenience. (R. 540)

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"Exam. Carter: I will adhere to my ruling, but if

Counsel for the appellant refused to make this identification on the record as permitted by the Examiner. Instead, he proposed that the identification of the excluded exhibits (none of which, it was expressly declared, related to the situation at Chicago) should be made privately

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you parties want, for your own convenience, to have these exhibits which you are offering marked, I will allow them to be marked starting with Number A.

"Mr. Gladson: Well, Mr. Examiner, is it understood that even after we get them marked we won't be given an opportunity to offer them in evidence?

"Exam. Carter: I think that I have already ruled on that, but if you want me to rule specifically, I think I will do it. I rule on it on the ground that the testimony is irrelevant and immaterial; that this issue here is whether or not the Union Stock Yard and Transit Company of Chicago is a common carrier subject to the act, that no matter what the conditions at other stock yards may be, those conditions cannot have any bearing upon or any effect upon the commission's determination of the status of the Union Stock Yard and Transit Company.

"Mr. Gladson: Mr. Examiner, I do not feel disposed to accept the ruling of the Examiner as final in this case. I am suggesting at this time that the hearing be postponed to give the respondent an opportunity to take up with the full commission the question of the admissibility of this particular evidence, in a motion to the full commission, so that the commission may have the facts before them. R. 541)

"Exam. Carter: Well, for instance, you read in the record, the titles of certain exhibits. If you want to give some kind of a designation to those titles, for your own convenience and future reference, I will permit you to do that. In other words, if you have the first Sioux City Exhibit, say, the Articles of Incorporation, you might refer to it as Sioux City Exhibit A. If the second one was some other paper you might say that that was Sioux City Exhibit B.

"Mr. Gladson: Yes.

"Exam. Carter: *And I will allow that designation to appear in the record.* Now, is that clear?

"Mr. Gladson: Now, let me ask you, Mr. Examiner, will

off the record and this proposal was accepted[1] but never taken advantage of by appellant.

As stated above, counsel for appellant asked what disposition of the excluded exhibits should be made, and indicated his intention to mail them to the Commission. (R. 549) He was instructed by the Examiner: "You will mail them to the Commission with any petition that you might desire to file". (R. 549) At the instance of counsel for appellant, this understanding as to the marking of the exhibits was again confirmed on the record

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you allow, after they have been so marked, an offer to admit those particular exhibits?

"Exam. Carter: What did he say there?

(Mr. Gladson's remarks read.)

"Mr. Gladson: In other words, will you allow us to offer them in evidence?

"Exam. Carter: I have ruled that they were inadmissible. I have ruled that testimony of that character was inadmissible and, of course, if you want me to make the ruling over again, I will make the ruling over again. I have already made the ruling. That is clear to me." (R. 548-549; italics ours)

[1] "Mr. Gladson: Now, one of my associates suggests that I ask this question: If we take advantage of the Examiner's offer to put certain private marks on these exhibits at Sioux City and these other Yards, will they be received as marked exhibits by the Examiner, or will we mail them to the Commission, or just what disposition—

"Exam. Carter: They will not be received by the Examiner. *You will mail them to the Commission with any petition that you might desire to file.*

"Mr. Gladson: Then, I am wondering if we might have it understood with Mr. Smith, that instead of taking up the time of the Examiner, that Mr. McDougall and Mr. Hamilton, our associates, might get together and identify these exhibits so that they may be mailed to the Commission in connection with our petition.

"Mr. Smith: Mr. McDougall will be available to participate in that exercise and will be glad to join with

before the close of the hearings.[1] But when appellant, having rejected the Examiner's offer to mark the exhibits and to show their designation upon the record, filed its petition with the Commission to reopen the case and to require the admission of the excluded evidence (which if granted would have required the multiplication of the testimony and exhibits and the issue more than a hundredfold) it did not submit the questioned exhibits. (R. 164-199) Neither did it ask the Commission's permission to file them in connection with the petition. It merely offered to submit them "if the Commission so desires". (R. 164, 198-199) At the same time it admitted in the petition that it had stated the nature and purpose of the evidence and further

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Mr. Hamilton in putting his initials on these documents that their identity in that way will be fixed. It is my understanding of what you have in mind, Mr. Gladson, that all of these documents to which you now refer and suggest, that Mr. McDougall and Mr. Hamilton identify, are documents relating to the situation at these Stock Yards other than Chicago; is that a correct understanding?

"Mr. Gladson: That is a correct understanding, and cover most, if not all, of the posted markets in the country.

"Mr. Smith: Other than Chicago.

"Mr. Gladson: Other than Chicago." (R. 549-550). (Italics ours.)

[1] "Mr. Fulbright: Pardon me, I want to make a statement for the benefit of the record, and perhaps Mr. Smith would want to hear it before he proceeds. The Respondent wishes the record to show that respondent will proceed as promptly as practicable to file a motion with the Commission appealing from the ruling of the Examiner with respect to the testimony and the exhibits which were not admitted in evidence, particularly testimony and exhibits pertaining to the various other markets, and will refer to the exhibits which the record shows the Examiner has permitted us to designate by some appropriate lettering, which service will be performed by Counsel for the respective parties. We expect to follow that through, Mr. Examiner, as promptly as we can." (R. 570)

said that: "The nature as well as the purposes of the rejected evidence is shown further at many other places in the petition". (R. 164, 198) Since the nature and purposes of the evidence had been disclosed both on the record at the time of the hearings and in this petition, there was no need for the physical incorporation in the record of the detailed exhibits or for any further elaboration as to their contents.

Appellant has cited no authority that a party is denied a fair hearing if, having fully disclosed the nature and purpose of evidence which has been rejected, the party is denied leave to continue to elaborate the offer of proof by putting it in question and answer form, with the result that the proffered showing is incorporated in the record precisely in the form in which it would have appeared if received in evidence. Since the nature and purpose of all the evidence had been disclosed and its relevance thoroughly discussed, such a procedure would have been utterly useless. The District Court committed no error in refusing to enjoin the enforcement of the Commission's order on this ground.

Following the argument in support of its contention that the Commission denied appellant a fair hearing by arbitrarily refusing to receive the evidence just discussed, appellant devotes several pages of its brief (pp. 117-119) to criticism of the Commission and its Examiner in respect to evidence which was received at the hearing including certain information elicited from appellant's Vice President and General Manager. The acceptance of such evidence is not specified as error and the only purpose of appellant's comment upon it, presumably, is an effort to give color to its contention that the Commission was arbitrary in its exclusion of the evidence sought to be introduced by appellant. Certain of appellant's statements in

this connection could be so easily misunderstood that we should comment upon them briefly.

As an extreme example of the arbitrary conduct of the hearing, of which it complains, appellant states that inquiry was made "whether appellant was sponsoring proposed legislation in Congress". (Br. 117) The appellant's General Manager, the witness Henkle, agreed on cross-examination that he had testified at the first hearing that if the appellant succeeded in withdrawing its tariffs from the Commission, the fixing of its charges for the loading and unloading service would be a matter of barter and trade. The witness then volunteered the statement: "but in the development of our plans it may well be that the charges will all be subject to the Secretary of Agriculture * * *." (R. 313) The purpose of the hearing was to determine whether the appellant was subject to the Interstate Commerce Act, and the Commission being advised that the Yard and Transit Company was developing plans which might cause it to be subject to the jurisdiction of a different administrative tribunal, it was certainly proper, and we believe, the duty of the presiding Examiner, to ascertain the nature of the plans. After the witness had made a number of inconclusive replies to questions as to the nature of these plans, the Examiner inquired: "When you say plans, do you have in mind any legislation that has been introduced this summer?" (R. 314) The Examiner referred to proposed legislation before the Congress which provided in specific terms for transferring the jurisdiction of the Commission over the loading and unloading service to the Secretary of Agriculture. The public record of the hearings on this bill [1] show that representatives of the appellant did appear before the Senate Committee on Agriculture and Forestry in support of

[1] 75th Congress, S. 2129, H. R. 6732.

that legislation which, however, was never reported out by the Committee.

The Examiner is criticised also for eliciting from appellant's General Manager the information that appellant seeks to free itself from the regulation of the Commission in order to increase its charges from $1.25 to $4.25 per car. (Appellant's brief, p. 118) It was proper for the Examiner, we submit, to ascertain the relation of the appellant's effort to free itself from regulation, to one of the underlying purposes of the Interstate Commerce Act, namely, that "all charges made for service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable," (Sec. 1 (5)) as determined by the Commission pursuant to the provisions of Section 15 of the Act.

The same witness thus testified that appellant was seeking to escape the jurisdiction of the Commission so that it could make this increase in its rates (R. 311), and that it was developing plans under which it "may well be that the charges [for the loading and unloading service] will all be subject to the Secretary of Agriculture." (R. 313) The vital interest which of necessity the trunk line railroads (the protestants) have in the measure of this charge caused them to inquire from the witness why the appellant would prefer to file its proposed higher rate with the Secretary. It was in connection with this inquiry that it was developed that the Secretary has never fixed any of the rates charged by the appellant for any of the stockyard services performed by it at Chicago. (R. 324, 325)

For the same general purpose appellant quotes (Appellant's brief, p. 115) certain statements of the Examiner and counsel which are said to be "enlightening". The excerpt would be more truly enlightening if more had been quoted.

As will be found from reading the entire discussion (R. 565, 566) of which that quoted is a part, the colloquy ensued when it was discovered that certain data repeatedly held inadmissible had nevertheless been physically incorporated in the record.

We respectfully submit that the decree of the District Court which dismissed the appellant's bill of complaint should be affirmed.

Respectfully submitted,

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
D. ROBERT THOMAS, JR.,
Counsel for railroad intervenors.